

UC-NRLF



B 4 147 220



ABD  
re  
B  
Ji

AGN  
G  
at

ALE  
A  
D

AME  
Sy  
C

AME  
ap  
La

at-Law. Fifth Edition. Royal 8vo. Leather back, cloth side, Rs. 18; half English law-calf, Rs. 20.

**BONNERJEE.—The Interpretation of Deeds, Wills, and Statutes in British India.** Tagore Law Lectures, 1901. By **SHELLEY BONNERJEE**, Barrister-at-Law, and Advocate of the High Court at Calcutta. Royal 8vo. Second Edition. [In preparation.]

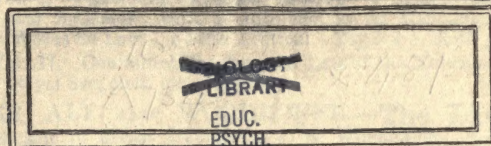
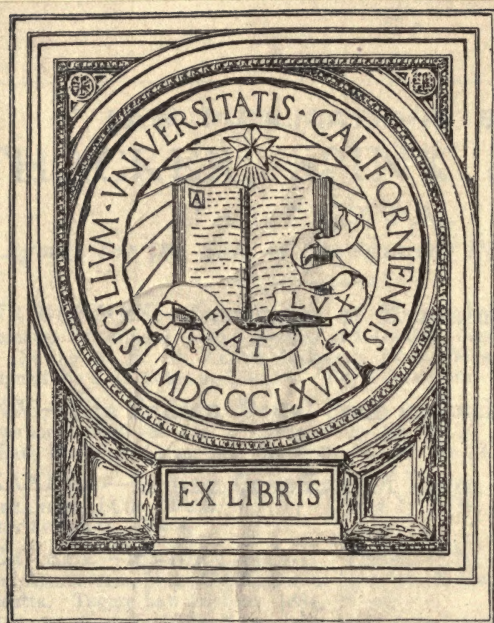
**CHALMERS.—The Law Relating to Negotiable Instruments in British India.** By the Hon'ble **M. D. CHALMERS, M.A.**, Bar-at-Law. Fourth Edition. Edited by **A. EGGAR**, Bar-at-Law. [In preparation.]

**COLLETT.—The Law of Specific Relief in India: Being a Commentary on Act I of 1877.** By **CHARLES COLLETT**, late of the Madras Civil Service, Bar-at-Law. Fourth Edition. By **H. N. MORISON**, Bar-at-Law, and Advocate of the High Court at Calcutta. Demy 8vo, cloth. Rs. 12. [1907.]

**COLLIER.—The Bengal Local Self-Government Act and the General Rules framed thereunder.** With Critical Explanatory Notes, Hints regarding Procedure and References to the Leading Cases on Law relating to Local Authorities. By **F. R. STANLEY COLLIER, B.C.S.** Fifth Edition by **W. EGERTON, I.C.S.**, for use in Bengal. Crown 8vo, cloth. Rs. 10. [1909.]

**COLLIER.—Bengal Local Self-Government Handbook** Containing the Bengal Local Self-Government Act (B. C. Act III of 1885) and other Laws relating to the Duties of District Boards in Bengal with the General Rules and others issued by the Local Government including the Special Rules in force in Eastern Bengal, and Notes. By **F. R. STANLEY COLLIER, B.C.S.** Fourth Edition by **H. LE MESURIER, I.C.S.** (For use in Eastern Bengal and Assam.) Crown 8vo, cloth. Rs. 10. [1908.]

**COLLIER.—The Bengal Municipal Manual: Being B. C. Act III of 1884 as amended by B. C. Acts III of 1886, IV of 1894, and II of 1896, and other Laws relating to Municipalities in Bengal, with Rules, Circular Orders by the Local Government, and Notes.** By the late **F. R. STANLEY COLLIER, C.S.** Seventh Edition. By **H. T. S. FORREST, I.C.S.** Cr. 8vo, cloth. [Nearly ready.]



CO.,

lications.

n Law. With from 1792 to 1906. r, Barrister-at-Law, s. 16. [1908.]

r Acts of the NEW, Kt., Barrister- [1898.]

By the late R. D. r, Barrister-at-Law. [1910.]

he Right Hon. the High Court at

Wills, Pre-emption Jurisprudence and Rs. 18. [1913.] ans. Third Edition- [1908.]

of Evidence B.C.L., Barrister-at-MATHEW, Barrister- half [1911.]







THE LAW  
OF THE  
STATE OF NEW YORK

IN SENATE  
JANUARY 18, 1882

REPORT OF THE  
COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A  
RESOLUTION PASSED BY THE SENATE

APRIL 18, 1881

ALBANY:

W. H. BROWN, PRINTER

THE STATE OF NEW YORK

IN SENATE

JANUARY 18, 1882

REPORT OF THE

COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A

RESOLUTION PASSED BY THE SENATE

APRIL 18, 1881



PSYCHOLOGY  
APPLIED TO LEGAL EVIDENCE  
AND  
OTHER CONSTRUCTIONS OF LAW.



PSYCHOLOGY  
APPLIED TO LEGAL EVIDENCE  
AND  
OTHER CONSTRUCTIONS OF LAW



# PSYCHOLOGY

APPLIED TO

# LEGAL EVIDENCE

AND

## OTHER CONSTRUCTIONS OF LAW

SECOND EDITION

REVISED AND RE-WRITTEN IN PARTS

BY

G. F. ARNOLD, I.C.S., C.I.E.

*Late Member of the Burma Legislative Council and formerly Offg  
Deputy Secretary to the Government of India  
Legislative Department*

## CALCUTTA

THACKER, SPINK & CO.

1913



BF 761  
A7  
1913

~~BIOLOGY~~  
LIBRARY  
EDUC.  
PSYCH.  
LIBRARY

PSYCHOLOGY

OF THE

LEGAL EVIDENCE

AND

OTHER CONSTITUTIONS OF LAW

*main lib.*

SECOND EDITION

REVISED AND ENLARGED EDITION

CALCUTTA:

PRINTED BY THACKER, SPINK AND CO.

1913

G. F. ARNOLD, B.A., LL.B.

Author of the *Law of Evidence*, *Law of Contract*, and *Law of Torts*

Formerly Lecturer in Law at the University of Calcutta

Formerly Lecturer in Law at the University of Bombay

Calcutta  
of

CALCUTTA

THACKER, SPINK & CO.

1913



TO

**JAMES EMILE BRIDGES,**

*Retired Member of the Indian Civil Service, Burma,*

**THIS VOLUME IS RESPECTFULLY DEDICATED.**



JAMES EARL RAY

Author of "The American Revolution"

THE UNIVERSITY OF CHICAGO PRESS



## PREFACE TO THE SECOND EDITION.

---

THE chief alterations in this edition are the insertion of a new chapter on some specific defects of the law, with examples in the Appendices, which are also new, and the omission of the chapter containing a psychological examination of Ameer Ali and Woodroffe's edition of the Indian Evidence Act. Additions have also been made to all the chapters except that on Causation which is unaltered. One of the critics of the First Edition drew attention to Stern's work '*Beiträge Zur Psychologie der Aussage*,' the existence of which was unknown to the author at the time the first edition of this book was published. When revising it for the second edition every effort was made to obtain a translation of the above work, but it appears that it has not been rendered into English. As the author is unacquainted with German, he has been compelled to relinquish the idea of consulting that treatise or any other work of the author quoted. He has, however, utilised and quoted freely from Professor Münsterberg's work '*Psychology and Crime*' which appeared since the first edition of the present work.

G. F. ARNOLD.





## PREFACE TO THE FIRST EDITION.

---

THIS work does not claim to be an original treatise on either Psychology or Law. The author has merely aimed at applying the conclusions of the former to legal evidence and other doctrines and constructions of legal writers. As psychologists are not agreed on every point, as happens in most sciences, it will no doubt be possible to find conflicting views on psychological subjects quoted in different parts of this book without any comment by the writer. It must, therefore, be explained here that the author did not consider it necessary, for the purposes of a work like the present, to reconcile such contradictions, and that though in most instances he has chosen to follow the view of some one particular writer, it must not on that account be assumed that he was necessarily ignorant of the existence of other theories. Nor again has he felt himself debarred from occasionally quoting alternative doctrines in different passages, in a few instances in which their application appeared advantageous and in which he was not prepared to hold that either conclusion was necessarily wrong.

It is also desired to anticipate a condemnation which he will possibly incur at the hands of some readers. It is not unlikely that it will appear to some that it is unseemly on the part of one whose legal qualifications are so slight to criticise the writings of accepted authorities like Sir Frederick Pollock, Sir James Stephen, Mr. J. D. Mayne and others, in the free way which the author has done in



this volume. A similar resentment may also be felt at the manner in which some of the decisions of the Judges in England and the High Courts in India have been handled.

It appears, however, to the writer that such an attitude on the part of his readers would be founded on a misapprehension. No claim is either tacitly or openly made in this book to excel such writers or judges in knowledge of the theory or practice of law, as the law is at present understood. The work which is now put forward contains rather a plea for the adoption of a different idea of the sphere of law and a different interpretation of legal duties from those which prevail. For any new idea to win acceptance it is necessary to show that there is some fault in the existing system which it seeks to alter, or at least that the recognized theories and doctrines are capable of improvement. But this cannot be done without a resort to criticism, and it is clear that if every view of a legal authority or past decision of a High Court Judge is to be regarded as above challenge, the law must remain immutable for ever. As, however, the circumstances of human life change and knowledge increases, the law, unless it also advances with the times, must rapidly become useless for practical purposes, or if its antiquated notions are attempted to be enforced in its changed surroundings, flagrant injustice will evidently result.

This is what, in the author's opinion, is happening and among other methods of making it clear, the applications of the conclusions of psychology are most striking. It must, therefore, result that the tone of the present work should be critical and its method destructive ; but it would be quite unjust to infer from this that the author has wantonly displayed a lack of proper respect for men who have justly attained to eminence in the line which they and others

chose to regard as the proper and only legitimate sphere of the law.

The author has not been able to obtain access to the latest edition of every work quoted, but in no instance has he reason to believe that he has cited an opinion abandoned by the writer in a later edition.

G. F. ARNOLD.

---





## CONTENTS.

CHAPTERS.	PAGES.
I. GENERAL INTRODUCTION .. .. .	1—24
II. SOME SPECIFIC DEFECTS OF THE LAW .. .. .	25—86
III. INTENTION .. .. .	87—118
IV. INTENTION (concluded) .. .. .	119—166
V. MEMORY .. .. .	167—203
VI. ATTENTION, THE SENSES, INTROSPECTION, INFERENCE	204—238
VII. THE NORMAL MAN .. .. .	239—269
VIII. CAUSATION .. .. .	270—300
IX. BELIEF, DOUBT, TESTS OF TRUTH, REALITY .. .. .	301—344
X. FEELING, IMAGINATION, PREJUDICE, HABIT .. .. .	345—379
XI. INSANITY .. .. .	380—406
XII. INSANITY (concluded) .. .. .	407—437
XIII. HALLUCINATIONS, ILLUSIONS, HYPNOTISM, SLEEP .. .. .	438—471
XIV. IDENTITY, SIMILARITY, COMPARISON OF HANDWRITING,	
IMITATION .. .. .	472—500
XV. RESPONSIBILITY, PUNISHMENT, JUSTICE .. .. .	501—543
XVI. DIFFERENCES OF RACE .. .. .	544—565
APPENDIX I, CONTAINING SOME EXAMPLES OF THE	
UNDULY NARROW AND RESTRICTIVE INTERPRETATIONS	
OF THE LAW .. .. .	566—576
APPENDIX II, ON THE FAILURE OF THE LAW TO ADAPT	
ITSELF TO THE PROGRESS OF THE TIMES AND THE	
CONDITIONS AROUND IT .. .. .	577—588
INDEX .. .. .	589—607











# PSYCHOLOGY

APPLIED TO

## LEGAL EVIDENCE AND OTHER CONSTRUCTIONS OF LAW.

### CHAPTER I.

#### GENERAL INTRODUCTION.

Difficulties in the way of the reception of this book—Hostility of the lawyers to philosophy—Description of two classes of lawyers—Examples of the hostility referred to—The present attitude of the lawyers to progress unique—The need of some reformation in law—Evidence of dissatisfaction with its present administration—Relation of the law to metaphysics and other sciences—Duty of the lawyers to avail themselves of the conclusions of other sciences—Similar revolt in philosophy against the unreality of some systems of thought—Particular reasons for the application of psychology to law—Quotations from the Evidence Act and legal writers relating to it—Reasons for the neglect of psychology hitherto shewn by the lawyers—Their traditional attitude to anything outside the Statute-book and their ignorance of what psychology teaches—Concluding remarks.

It must be confessed at the outset that it will be surprising if this volume should be welcomed by the legal profession. It treats, it is true, of legal matters, but it does so in what is believed to be a new way, and a way which is not likely to command the sympathy of the legal mind. For our lawyers have always shewn themselves averse to novelty, and a systematic application of psychology to any branch of the law is sufficiently novel to cause them a shock. Apart, however from this, there is a further prejudice to overcome. If there is one path which lawyers and judges fear to tread it is that of philosophy : if there is one region in which they do not feel themselves safe, one atmosphere which they regard as poison, it is that of philosophy.

Difficulties in the way of the reception of this book.

Descriptions of the two classes of lawyers at the present time.



phical notions and metaphysical ideas : and psychology, it must be admitted, is but one branch of mental philosophy. Yet such is the irony of the case that, anxious as they are to avoid the discussion of these matters, the subjects with which they deal are perpetually presenting them with problems whose real character is such that they cannot be solved adequately without the aid of philosophy.

What then is their attitude in these circumstances ? It seems to us that it varies with the individual writer or judge : if he is of the strict narrow type he resolutely rules out as impossible the philosophical consideration of what comes before him and strains some legal maxim or precedent to cover the case. Whether wilfully or unconsciously blind to the fact that it has no application, he pursues the only method which he knows or wishes to know, convinced that salvation lies here alone, and affects to have solved the problem, though in truth he has all along been dealing with fictions and has arrived at the most artificial of results. But this he cannot perceive and therefore will not admit : his reasonings may be based on presumptions which are at variance with both fact and psychological truth, but they are ' legal ' and therefore must be right : his conclusions may offend both common sense and the plain man's feeling of natural justice, but they are warranted by his legal precedents and therefore are beyond dispute : his decision may in reality be no decision of the case at all, and may in effect leave the parties exactly where they were at the outset, but nevertheless legal justice has been done and the matter settled if only by the rule of *res judicata*. He is content with this result.

If, however, he has been partially educated in some other school than that of the law and has a brain that is filled with something beside legal rulings, he perceives that his case must be defended on other principles. He is, therefore, rather inclined to disown his legal brother whom we have described above : he admits that the law is intended to satisfy social needs, and apologises for its methods—thereby tacitly admitting that it fails to do so—on the ground that it is impossible to admit discussion in the law courts of all the considerations which apply to daily life, as that would make law-suits endless and decisions uncertain. He allows that the law does not always aim at what is usually known as truth, but affirms that progress is being made towards placing the law of evidence ' on broad

and scientific, and therefore practical foundations' and making 'formal truth' coincide, as far as possible, with 'real truth.' He speaks of the use of 'a free logic' and of applying principles 'broadly,' and will here and there insert a sentiment against the too strict exclusion of evidence, as, *e.g.*, "but the principle of exclusion should not be so applied as to exclude matters which may be essential for the ascertainment of truth,"(a) or "But it has been said in England, where the traditional theories still possess much strength, that artificial rules upon matters of evidence are better avoided as much as possible, and that the law now is that, with a few exceptions on the ground of public policy, all which can throw light on the disputed transactions is admissible."(b) Quotations of the following kind will appear without comment:— "it is the tendency of modern jurisprudence to admit most evidence logically relevant,"(c) and again: "It is the business of courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them."(d) When questions that are really metaphysical in character, as, *e.g.*, causation, arise, instead of ignoring or smothering them with some useless dictum, this type of lawyer will make an effort to treat them by putting forward some definite doctrine, as Sir Frederick Pollock has done in his work on the Law of Torts:(e) he will further think it necessary to note the possibility of the psychological view being contrary to the legal one and to explain *en passant* why the former must be rejected.

It is the existence of this second class of lawyers, though we fear they are much in the minority, that has encouraged us to publish the present work. Their attitude gives us some glimmering

(a) See Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act, p. 6, note 1.

(b) See Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act, Introduction, p. 5.

(c) *Ibid.*, p. 122.

(d) *Ibid.*, p. 603.

(e) See his explanation of the doctrines of "immediate" and "proximate" causes, and of "natural and probable consequences" discussed in our chapters on Causation and the Theory of the Normal Man.



of hope : they do not appear to us so determined to shut out all new sources of knowledge merely because their predecessors were ignorant of them or refused to avail themselves of their aid. But at present we have to lament that, though they have relaxed their sentiments and widened their views to a certain limited extent, so strong is the force of legal training and the habit of the legal mind, that those who administer the law have not hitherto shewn themselves ready to accept these expressions of opinion or to apply them in cases, even though they would now have authority on which to lean.

2. We shall now proceed to justify by a few quotations the statement made above as to the hostility of lawyers to philosophy. An American lawyer says, very truly, that you can trace the subtle influence of the philosophy of the schoolmen in the English system even in the present day. That philosophy, it is true, perished at last, but it has left its impress, deeply stamped, on modes of thought. "The old lawyers," says Mr. Bigelow, "were from the beginning of their education steeped in philosophy as something apart, and they carried it as of course into their legal studies, into their arguments at the bar, into their opinion from the bench. Generation after generation inherited the vice, in constantly lessening quantities fortunately, but down to this very day in quantities large enough to account for no small part of the feeling of disrespect for the law." (a) "There is a point," says Sir F. Pollock, "where subsequent events are, according to common understanding, the consequence not of the first wrongful act at all, but of something else that has happened in the meanwhile, though, but for the first act, the event might or could not have been what it was. But that point cannot be defined by science or philosophy ; and even if it could, the definition would not be of much use for the guidance of juries. If English law seems vague on these questions, it is because, in the analysis made necessary by the separation of findings of fact from conclusions of law, it has grappled more closely with the inherent vagueness of facts than any other system. We may now take some illustra-

---

(a) Bigelow's Annual Address to the New York Bar Association, quoted by Dr. Rashbehary Ghose in his 3rd Edn. of the Law of Mortgage in India.

tions of the rule of 'natural and probable consequences' as it is generally accepted. In whatever form we state it, we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." (a)

Again speaking of negligence the same author says: "This, it will be observed, says nothing of the party's state of mind, and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them. Even if the terms were used by lawyers in a peculiar sense, there would be no need for apology; but the legal sense is the natural one." (b) He further quotes the distinction drawn between a cause and a condition by Mr. Wharton, and remarks: "But the contrast of 'cause' and 'condition' is dangerous to refine upon: the deep waters of philosophy are too near." (c)

Philosophy then, according to this writer, is to be avoided because it is both useless and dangerous. This recalls to us a remark of the late Prof. Jowett: "The uselessness of philosophers is explained by the circumstance that mankind will not use them. The world in all ages has been divided between contempt and fear of those who employ the power of ideas and know no other weapons." (d)

Yet without the aid of philosophy it is difficult to meet new situations, and there are signs that a new situation will have to be met even in the conservative realm of law. Men are chafing under the restraints of the present system: they feel that it is antiquated and has failed to adapt itself to the march of the times, and that what should be the servant of their social needs has become instead a tyranny and an anachronism that cramps their progress. When the face of the world is beginning to alter and with fresh knowledge

Necessity of some  
reformation in law.

(a) Pollock on Torts, 6th Edn., pp. 35-6.

(b) *Ibid.*, p. 421.

(c) *Ibid.*, p. 447, note 1.

(d) B. Jowett, Introduction to the Republic of Plato, 2nd Edn., pp. 78-79.



and discoveries ideas are changing, it is useless for lawyers to be guided by their old maxims and to repeat the old saws that were framed to suit the circumstances of a bygone generation. It is perceived that there is need of reformation in law and that reformation must come from outside, for the lawyers themselves are not the persons to accomplish it. (a) To them, with but slight alteration, may be applied what Buckle wrote of the Scotch clergy (b) :—  
 “ They assumed the truth of their own religion and moral notions, most of which they had borrowed from antiquity : they made those notions the major premisses of their syllogisms and from them they reasoned downwards till they obtained their conclusions. They never suspected that premisses taken from ancient times, might be the result of the inductions of those times, and that as knowledge advanced, the inductions might need revising.”

Write ‘ judges ’ for ‘ clergy ’ and ‘ legal ’ for ‘ moral ’ notions and we have a description of our lawyers of to-day. It is just in this way that they obtained their conclusions concerning the human mind in the days before psychology existed as a science and they do not appear to realise that those ancient notions require revising now. “ All that they were concerned with,” says Buckle, “ was to beware that no error crept in between the premisses and the conclusion :” this is the attitude of the formal logician and of our legal writers. They aim not at truth but logic, which is the parody of truth, and the parody of it is worse than its absence ; for it is often injustice disguised. [ But men will not accept the conclusions however much they may follow from the premisses when they question those premisses themselves } they have no confidence in legal presumptions which contradict their experience and psychological knowledge, and they have no desire to be governed by precedents which have no application to what occurs in real life. They resent the attitude of those who always look backwards and refuse to listen to anything new : they see that while every other science and branch of knowledge is progressing the law alone remains crystallized and immovable, and if anything fresh is forced upon the notice of the lawyers it is always legally ‘ apperceived ’ in the sense of past conclusions. Nor is this resentment unreasonable :

(a) See Chap. II, paras. 10 and 13 *post*.

(b) T. H. Buckle, *History of Civilisation*, Vol. III, p. 286.

the legal manner of suppressing everything new finds a parallel only in the behaviour of primitive societies which are thus described by Prof. Stout: "In more primitive communities such as we find among savages, the general stock of ideas is assimilated by each individual, and all are equally its guardians. Thus the pressure of society upon the individual is incomparably more coercive. Any private rebellion against inherited and accepted tradition would be resented and suppressed with great speed and certainty. Thus primitive societies are intensely conservative and remarkably unanimous in their modes of thought. Each thinks as the rest think, and dares not persevere in any innovation which does not find general acceptance. Ideal activity is on the whole more occupied in finding reasons to justify tradition or to explain its apparent inconsistency with actual experience, than in further developing and improving the ideal scheme which has been handed down from generation to generation." (a)

What seems to us surprising is that lawyers should ever have blindly put their trust in precedents, when we consider what precedents mostly are: for they are not principles but attempts to elevate the concrete into the universal. It is clear that it is impossible to construct rules to meet all the complexities of human life, and even if it were otherwise, such rules would need constant revision. For it has been well said that what is the paradox of one generation is the common place of the next.

That there is a demand for some reformation seems to be dimly comprehended even by some legal writers: the existence of those to whom we have referred as the second class of lawyers indicates this, and their sentiments betray a consciousness that the old legal rules are breaking down. (b) The fact is that the lawyer, pure and simple, is over-specialized, and hence mutilated and stunted in his nature: for to be special in any function means to be rendered, to some extent, one-sided and narrow, (c) and this partly explains

(a) Stout, *Manual of Psychology*, pp. 533-4.

(b) See *e.g.*, Sir F. Pollock, *Principles of Contract*, 7th Edn., p. 7: "The truth is, as I venture to think, that the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions."

(c) F. H. Bradley, *Appearance and Reality*, p. 422.



why he rigorously excludes all sources of knowledge that are not contained in his own text-books. Those who cry for a trained lawyer to be their judge know not what they ask. If justice is to be valued above technicality and truth above logic, we cannot afford to neglect the assistance which can be derived from other learning beside that of the Statute-book in solving the problems of human life, and among such aids must be numbered the conclusions of psychology and, to a lesser extent, the teaching of metaphysics.

3. The reader may perhaps be disposed to challenge the statement that there is dissatisfaction among laymen with the present state of the administration of the law. From among many such expressions of disapproval that we have seen we shall therefore select two for quotation here. Others will be found in Chapter II.

Evidence of dissatisfaction with the existing administration of the law.

“To our great regret,” writes Prof. Haeckel, “we must endorse the words of Alfred Wallace: ‘compared with our astounding progress in physical science and its practical application, our system of government, of administrative justice, and of national education, and our entire social and moral organization remain in a state of barbarism.’ To convince ourselves of the truth of this grave indictment we need only cast an unprejudiced glance at our public life or look into the mirror that is daily offered to us by the press, the organ of public sentiment. We begin our review with justice, the *fundamentum regnorum*. No one can maintain that its condition to-day is in harmony with our advanced knowledge of man and the world. Not a week passes in which we do not read of judicial decisions over which every thoughtful man shakes his head in despair; many of the decisions of our higher and lower courts are simply unintelligible. We are not referring in the treatment of this particular ‘world-problem’ to the fact that many modern States, in spite of their paper constitution, are really governed with absolute despotism, and that many who occupy the bench give judgment less in accordance with their sincere conviction than with wishes expressed in higher quarters. We readily admit that the majority of judges and counsel decide conscientiously and err simply from human frailty. Most of their errors, indeed, are due to defective preparation. It is popularly supposed that these are



just the men of highest education, and that on that very account they have the preference in nominations to different offices. However, this famed 'legal education' is for the most part rather of a formal and technical character. They have but a superficial acquaintance with that chief and peculiar object of their activity, the human organism, and its most important function, the mind. That is evident from the curious views as to the liberty of the will, responsibility, etc., which we encounter daily . . . . . most of our students of jurisprudence have no acquaintance with anthropology, psychology and the doctrine of evolution—the very first requisites for a correct estimate of human nature. They have 'no time' for it; their time is already too largely bespoken for lighter pursuits and purposes. Their scanty hours of study are required for the purpose of learning some hundreds of paragraphs of law-books, a knowledge of which is supposed to qualify the jurist for any position whatever in our modern civilised community." (a)

Prof. James speaks of the spirit in which the legal profession carries out the work which the community has entrusted to them, in the following words :—"It is a matter unfortunately too often seen in history to call for much remark, that when a living want of mankind has got itself officially protected and organised in an institution, one of the things which the institution most surely tends to do is to stand in the way of the gratification of the want itself. We see this in laws and courts of justice . . . . . too often do the place-holders of such institutions frustrate the spiritual purpose to which they were appointed to minister, by the technical light which soon becomes the only light in which they seem able to see the purpose, and the narrow way which is the only way in which they can work in its service." (b)

Reasons of this dissatisfaction.	If we are asked to explain this dissatisfaction we should say that men have begun to recognise that the law does not meet the wants of their daily life, because it deals with unrealities and fictions.
----------------------------------	--

On seeking the causes of this it has become plain that the methods of the law and the legal education which is given to those who are

(a) E. Haeckel, *The Riddle of the Universe*, R. P. A., Edn., 1903, p. 3.

(b) W. James, *Human Immortality*, p. 7.

to administer it are calculated to produce nothing else but artificial results, and we shall now endeavour to show how this situation has come to pass.

4. The world of our law courts is not something independent, as the lawyers strive to make it, but is a mere element in our total experience: to attempt therefore to shut themselves off from the rest of existence and be guided by presumptions and arguments that have no validity elsewhere is an impossible attitude for men who have to decide on the merits of claims that arise out of real life. Now we trust that we shall not be misunderstood on this point: we are aware that the object of the law is not the ascertainment of ultimate truth in the metaphysical sense, and that the ideas, with which it works, are not intended to set out the true character of reality: hence to subject these ideas to metaphysical criticism, without any further object, would be to mistake their end. The question, as we conceive it, is not whether legal principles possess an absolute truth to which they make no claim, but whether the abstractions, employed by the law, are legitimate and useful or even possible without injustice and error resulting. If legal writers admitted that the law was an abstract science and its subject-matter consisted of abstract beings, and that it presumed that all of them were of the 'average' or 'ordinary' type, *e.g.*, the man of average prudence, the typical reasonable man, the man of common care and caution, etc., and that all the Acts and Statutes and commentaries on them and precedents and legal decisions were an intellectual construction intended to explain the conditions under which such beings acted, to systematize and enable us to understand their ways and the occurrence of events among them, then our attitude in the matter would be different. (a) We should study them as the laws of a class of phenomena simply regarded by themselves, and we should look upon this legal construction as a convenient method of considering certain facts apart from others: if it were found that some of these ideas contradicted themselves or in the end were not true, we should not trouble, provided that on the whole they played

---

(a) Cf. Bradley, *Appearance and Reality*, pp. 283-4, where the relation of metaphysics to natural science is discussed.



their part in enabling us to understand our subject and draw exact conclusions. We should then consent to apply these conclusions, as far as we found them useful and with the necessary modifications and limitations which we should expect to have to make, to the circumstances of real life and the real men whose affairs we had to determine. But while quite willing to avail ourselves of the aid of these legal conclusions we should not regard their existence as any reason for excluding the conclusions of other sciences, and among them psychology, which we might find equally or more useful for the work in hand.

The case in short would be similar to that of Political Economy regarded as an abstract science. Assuming that men are guided entirely by selfish motives and aim solely at wealth, as did Ricardo and Adam Smith in his treatise on the Wealth of Nations, exact conclusions may be drawn which will apply under such abstract circumstances : but the inevitable result follows that, as all men are not selfish and many are guided by other considerations than that of wealth, the conclusions of Political Economy must be greatly modified in their application to daily life, and no sagacious politician dreams of framing his measures as though the economic end was the only or even the supreme end of the State. He will look also to the conclusions of Ethics, Æsthetics, Political Philosophy and whatever has influence on the lives and thoughts of the citizens. Abstract conceptions are intended for the purposes of science rather than for application to each case that arises in daily life. This has been very clearly expressed by Dr. J. Ward in his comparison between the mechanical method of Physics and Economics.<sup>(a)</sup> “ The science of so-called pure or deductive economics has much in common with physics, that is to say, it sets out from definitions and axioms and seeks to describe economic facts by means of mathematical equations. The ‘ Economic Man ’ as conceived by Ricardo, a ‘ Market ’ as defined by Cournot, James Mill’s ‘ Doses of Capital,’ the ‘ Margin ’ of Cultivation,’ or Jevons’ ‘ Supply and Demand Curves,’ are not things we expect to meet with in real life. They are abstractions that summarise experience, not concrete realities directly experienced.....Again, the Englishman or the French-

---

(a) J. Ward, *Naturalism and Agnosticism*, Vol. I, pp. 110—111.



man, or the civilised man or the savage is a concept not a reality. Yet a science of anthropology is possible in which different races of men and different stages of human development are compared by the help of mean values obtained by dealing with nations and societies *en bloc* and perhaps 'in this way,' as Lotze has said, 'we may easily imagine how all kinds of formulæ may be arrived at, expressive of the acceleration and breadth and depth and colouring of the current of historical progress, formulæ which, if applied to particulars, would be found to be utterly inexact, but which can yet claim to express the true law of history as freed from disturbing individual influences.... Try to picture to yourselves the sort of science of man and of society that would be formulated by an intelligence whose data were confined to anthropometrical and other statistical results and who treated his data in the customary physical fashion. You will conclude, I think, that his human beings or homunculi would come out surprisingly like Herschel's molecules as 'manufactured articles,' and that his theory of society would have more than a superficial resemblance to the kinetic theory of gases.'

Now the same is true in principle of law : it also has its own definitions from which it sets out, a separate legal meaning of terms which need in no wise correspond to that given them in real life, its maxims which it regards as axioms and its presumptions by which it seeks to determine from such data its matters of fact and law. Its 'average man,' 'reasonable man,' 'man of ordinary prudence,' etc., are abstractions merely that summarise experience not concrete realities, and by the help of such conceptions it deliberately seeks 'to be freed from disturbing individual influences.' And will not the result be the same ? Its formulæ when applied to particulars will be found to be 'utterly inexact,' and its human beings or homunculi constructed in such fashion surprisingly like 'manufactured articles.'

Our lawyers have made a fetish of what they term 'certainty,' and in their efforts to obtain it in their decisions have hurried blindly into generalisations and made the reality conform to the abstract rather than the abstract to the reality : they have abandoned the substance for the shadow, the matter for the form, and the certainty which they thereby achieve, in so far as they achieve it, is

as mechanical as the aim of the physicists. Like them they have preferred calculability to truth, simplification to reality, and have sought to cover the nakedness of their conclusions by ascribing as it were objective existence to the abstractions which they formed : for this is in fact the effect of treating such conceptions as the only matter existent for law. [Nor have they ever grasped the truth that when you have reduced things to a formula you have only got a description of facts not an explanation of them.]

We thus contend that the lawyers do not appreciate the situation : their work is to decide the cases and the suits of living men and not abstract beings, and these men act under particular circumstances and are influenced by motives that are not necessarily normal and general, but are always determined by some special consideration. The reasonable course to take would be to regard the legal presumptions and conclusions as capable of application only with modifications and approximately, and to correct them wherever they are found to conflict with the conclusions of other sciences that are more deeply concerned with that department of human life. For example, in the realm of mental qualities, human motives and conduct, legal presumptions must yield to the conclusions of psychology when they clash, for psychology has specially studied this branch : on the questions of responsibility and punishment the precepts of moral philosophy should not be ignored—and indeed lawyers may be reminded that they are the basis of equity—just as in one department, *viz.*, that of medicine, the lawyer admits that he must bow to the decisions of an expert science in problems requiring a knowledge of anatomy, poisons, etc. What, however, is the attitude of the legal profession in the matter ? Instead of having recourse to the assistance of these sciences in matters where they are ignorant, they draw a number of arbitrary presumptions as, *e.g.*, that a man must be presumed to know and therefore to intend the probable consequences of his act, which contradict both the teachings of other sciences and the experience of mankind, and they seek to apply general rules in the shape of legal maxims to particular cases, purposely excluding from consideration the very circumstances that make the cases particular. Nor do they disguise the fact

Duty of lawyers  
to avail themselves  
of the conclusions of  
other sciences.



but justify this legal shorthand by assertions such as that it is impossible to enter into all the considerations which affect each case as litigation would never terminate, and they could never arrive at any certain decision : in short the law cannot embrace all the complexities of human life—it is *subtilitati vitæ humanæ longe impar*. The reply to this seems to be : such attempts to concrete the abstract are unwarrantable and impossible of success ; if your decisions avowedly do not cover the whole case, your methods are artificial and fictitious and cannot produce anything but injustice. We do not want you : you should get out of the position that you have arrogated to yourselves and abate your pretensions to deal with real life.(a)

5. The revolt against the unrealities of the law is similar to the re-action in the philosophical world of the Pragmatists or Humanists against the older Intellectualism. It is due in both cases to a demand that man shall be taken as he is and shall not, by a species of abstraction, be deprived of the qualities which entitle him to the name of man and left a mere abstraction which may be easier to handle but which does not represent any reality which has ever had any actual existence.

Similar revolt in philosophy against the unreality of certain systems of thought.

The philosophical justification for this revolt began with the recognition that the real for us must be what is knowable to us, and that it is idle to attempt to abstract from reality the subjective side, *i.e.*, the part which the individual's knowledge plays in the matter. It went on however from this basis to develop the view that each individual makes his own reality what it is. " But this truth (*i.e.*, that reality is conditioned by our knowledge) is incomplete until we realize all that is involved in the knowledge being *ours* and recognize the real nature of our knowing. Our knowing is not the mechanical operation of a passionless, pure intellect, which

Grinds out good and grinds out ill,  
And has no purpose, heart or will.

Pure intellection is not a fact in nature ; it is a logical fiction which will not really answer even for the purposes of technical logic. In

---

(a) For further remarks on the meaning of Real life, see Chap. VII, para. 11.



reality our knowing is driven and guided at every step by our subjective interests and preferences, our desires, our needs and our ends. These form the motive powers also of our intellectual life.”(a)

This school of philosophy insists that we cannot expunge from our thinking every trace of feeling, interest, desire and emotion, for these influences are all pervasive in our thinking, but we must be “content to take Man on his own merits, just as he is to start with, without insisting that he must first be disembowelled of his interests and have his individuality evaporated and translated into technical jargon before he can be deemed deserving of scientific notice.” Man is the maker of the sciences which subserve his human purposes and he is greater than any method which he has made. He will recognise the rich variety of human thought and sentiment and will not ignore actual facts for the sake of bolstering up the narrow abstractions of some *a priori* theory of what ‘all men must think’ and feel under penalty of scientific reprobation, abstract *dicta* which by themselves mean nothing, and whose real meaning lies in the applications, which are not supplied.(b)

Our interests impose the conditions under which reality is revealed to us, we only attempt to know what are objects of actual desire : reality and the knowledge thereof presuppose a definitely directed effort to know, and this effort is purposive, *i.e.*, it is necessarily inspired by the conception of some good at which it aims. “Neither the question of *Fact*, therefore, nor the question of *Knowledge*, can be raised without raising also the question of *Value*. Our ‘Facts’ when analysed turn out to be ‘values’ and the conception of ‘Value’ therefore becomes more ultimate than that of ‘Fact.’ Our valuations thus pervade our whole experience and affect whatever ‘fact,’ whatever ‘knowledge’ we consent to recognise.”(c) We have thought it worth while to quote these passages because they explain the importance of individuality in every case. If the individual makes his ‘facts’ and his ‘knowledge’ for himself in this way, you cannot take away his individuality and expect to arrive at the truth by a mere consideration of objective results as they appear to others, or should appear to a typical man.

---

(a) F. C. S. Schiller, *Humanism*, pp. 9-10.

(b) *Ibid*, pp. x & xx-xxiii.

(c) *Ibid*, p. 10.

Yet this is the method of the law. Like the old intellectualists who sought to arrive at the truth by abstracting feeling, emotion, and whatever is particular to the individual man, and dealing with a *residuum* of pure thought, so our lawyers have abstracted all that is connected with the individual, all his particular feelings, his special environment and circumstances, and have then endeavoured by general presumptions and the construction of abstract legal conceptions such as that of the average man, to arrive at a true conclusion concerning the conduct of the same individual. How can they expect by such a method to reach any result that is even remotely connected with the reality.

To one outside the legal circle it appears that they have become slaves to a method which is a radically bad one : they have forgotten that man is the maker of his methods, and that, if those methods fail, it lies with him to reform them. Most do not even see that their method not only does fail but must necessarily fail ; on the contrary they are satisfied with a system which appears to the plain man to be deplorable both because of the actual injustice it works and the blind prejudice of its authors.

6. More particular reasons for the application of psychology to legal evidence drawn from psychology and the law itself will now be adduced.

Particular reasons  
for the application  
of psychology to  
law.

In the first place psychology is the basis of all the Social Sciences of which the law is one. This has been asserted by Mr. W. McDougall in the following passage :—

“ Among students of the Social Sciences there has always been a certain number who have recognised the fact that some knowledge of the human mind and its modes of operation is an essential part of their equipment, and that the successful development of the social sciences must be dependent upon the fulness and accuracy of such knowledge. These propositions are so obviously true that any formal attempt to demonstrate them is superfluous. Those who do not accept them as soon as they are made will not be convinced of their truth by any chain of formal reasoning. It is then a remarkable fact that psychology, the science which claims to formulate the body of ascertained truths about the constitution and working of the mind, and which endeavours to refine and add



to this knowledge, has not been generally and practically recognised as the essential common foundation on which all the Social Sciences—ethics, economics, political science, philosophy of history, sociology and cultural anthropology, and the more special social sciences, such as the sciences of religion, of law, of education, and of art—must be built up.”(a)

He accounts for this by the failure of psychology at the outset to devote itself to that portion of its subject which is of primary importance to the Social Sciences, *viz.*, that which deals with the springs of human action, the impulses and motives that regulate conduct. From the omission of these sciences to recognise the importance of psychology, two results have ensued, which he thus describes: “Hence the workers in each of the Social Sciences, approaching their social problems in the absence of any established body of psychological truth, and being compelled to make certain assumptions about the mind, made them *ad hoc*; and in this way they provided the indispensable minimum of psychological doctrine required by each of them. Many of these assumptions contained sufficient truth to give them a certain plausibility; but they were usually of such a sweeping character as to leave no room for, and to disguise the need for, more accurate and detailed psychological analysis. And not only were these assumptions made by those who had not prepared themselves for the task by long years of study of the mind in all its many aspects and by the many possible avenues of approach, but they were not made with the single-hearted aim of discovering the truth; rather they were commonly made under the bias of an interest in establishing some normative doctrine; the search for what is was clogged and misled at every step by the desire to establish some preconceived view as to what ought to be. When, then, psychology began very slowly and gradually to assert its status as an independent science, it found all that part of its province which has the most immediate and important bearing on the social sciences already occupied by the fragmentary and misleading psychological assumptions of the workers in these sciences; and these workers naturally resented all attempts of psychology to encroach upon the territory they had learned to look upon

---

(a) W. McDougall: An Introduction to Social Psychology, 3rd Ed., p. 1.



as their own ; for such attempts would have endangered their system.” (a)

These words appear to us to give the explanation why the law has adopted so many false psychological assumptions, of which many examples will be given in this volume, and also why it is so hostile to the claims of psychology to reveal to it the truth. For it has based its legal doctrines on the false or inadequate assumptions which it was formerly compelled to make concerning mental phenomena. It is moreover a science which clings more tenaciously than any other to the views and opinions of the past : it is therefore not surprising that it should prefer now to ignore a new science which proves many of its accepted doctrines to be erroneous rather than to revise its past conclusions.

Lest it may be thought that Mr. McDougall is single in his opinion that psychology is the natural basis of these sciences including law, we quote another view to the same effect.

“ As the science of the universal forms of immediate human experience and their combination in accordance with certain laws,” says Wundt, “ it (*i.e.*, psychology) is the foundation of the mental sciences. These sciences treat in all cases of the activities issuing from immediate human experiences, and of the effects of such activities. Since psychology has for its problem the investigation of the forms and laws of these activities, it is at once the most general mental science, and the foundation of all the others, that is of philology, history, political economy, jurisprudence, etc.” (b)

Psychology is the positive science of mental process ; (c) its *data* are (1) introspection or perception of what takes place in our own mind, (2) retrospection or remembrance of past psychological processes in our mind, (3) observation of the outward signs of what passes in the minds of others or even in one's own mind. (d) These *data* cover the ground of much with which the estimation of evidence is concerned and, if it be suggested that common sense can take the place of psychology the implied opposition between them is not warranted. Their relation is thus described by Prof. Sully :

---

(a) W. McDougall : An Introduction to Social Psychology, 3rd Ed., pp. 5-6.

(b) Wundt, Outlines of Psychology, p. 17.

(c) Stout, Analytical Psychology, Vol. I, p. 1.

(d) *Ibid*, p. 13.

—“ Here again mental science is supplementing and rendering precise the inductions reached by popular thought. Men have for ages observed certain relations of dependence between circumstances and character, and one trait of character or habit and another. All the well-known sayings about character and life embody these observations. Such trite remarks as “experience is the best teacher,” “first impressions last longest,” contain the rough germ of psychological truths. The psychologist seeks to take up these “empirical generalisations” into his science, exhibiting them as consequences of his more accurate scientific laws.”(a)

It is thus no objection to say, “Oh, we know this without psychology :” you may guess it or you may have observed already that what psychology says is true, but with the aid of psychology you will know it better, for you will now understand the reasons. This knowledge will enable you to anticipate what would otherwise be merely unexplained departures from the general rule expressed in the popular saying.

Under s. 114 of the Indian Evidence Act ‘the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case,’ and “fact” is defined in s. 3 of the same Act “to mean and include(1) any thing, state of things, or relations of things, capable of being perceived by the senses ; (2) any mental condition of which any person is conscious.” It can hardly be denied that the study of psychology will assist in deciding whether such a mental fact is likely or not to have occurred : *e.g.*, whether two persons could both have been present and yet observed so differently, whether recollections could really have varied to such an extent, what is likely to be due to illusion, to prejudice, &c., &c.

In s. 8 again it is said that ‘any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact,’ and motive is directly treated of in psychology, while s. 14 is almost entirely psychological. “Facts showing the existence of

(a) Sully, Outlines of Psychology, p. 39.



any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.”

Section 159 deals with refreshing memory, and if necessary other examples could be cited both from this Act and the civil law, while the question of intention enters into practically every criminal offence and many contracts.

Further the necessity of psychology is admitted by almost every writer on evidence as will be illustrated by a few quotations here, and many others implying the same will be found throughout the work. A large part of the opening chapter of Best's Treatise on Evidence consists of quotations from Locke's work on the Human Understanding, and speaking of presumptions he says “ the grounds or sources of presumptions of fact are obviously innumerable—they are co-extensive with the facts, both physical and psychological which may under any circumstances whatever become evidentiary in Courts of Justice ; but in a general view, such presumptions may be said to relate to *things, persons* and the *acts and thoughts* of intelligent agents. . . . Under the third class—namely, the acts and thoughts of intelligent agents—come, among others, all psychological facts : and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature.”(a)

Another commentator writes :—“ The mental and physical conditions of a person must then be proved by the evidence of other persons who speak to the outward manifestations known to them, of states of mind and body. Such manifestations may be either by conduct, conversation or correspondence,”(b) and so far as the general rule relating to experts goes, there seems no reason why the services of an expert psychologist should not be employed, in the same way as doctors are examined on questions of insanity. “ The weight of such (*i.e.*, expert) evidence depends on the maxim *cuiuslibet in arte sua credendum est*, and the grounds of its admissibility are contained in the general rule ‘ that the opinion of witnesses possess-

(a) Best on Evidence, § 316.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 193.



ing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance : in other words when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature.”(a) In one passage the duty of the Court is laid down as involving considerable knowledge of psychology, it being left to the Court to attach to the evidence of the witnesses “that amount of credence which it appears to deserve from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction, as ought to justify a man of ordinary prudence in acting upon those statements.”(b)

Speaking of the object and scope of cross-examination it is said that a witness may be asked “all questions tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment,”(c) subjects which embrace the greater part of psychology. It seems clear that if such questions are to be asked a knowledge of psychology would be valuable not only to the judge, but also to the cross-examining advocate, while ignorance of it may very easily result in much useless questioning and waste of time. Finally we may remark that whenever a judge gives reasons for his belief or disbelief of evidence he involuntarily strays into psychology.

7. These passages from the Act and commentaries have been cited because, in view of the prejudice which exists in law against all branches of philosophy, we thought it well to show from the writings of the lawyers themselves that they admit the psychological character of some of the evidence with which they deal. Our complaint is that in spite of this admission they have hitherto altogether neglected this side of their work, for we are not acquainted with any treatise on evidence, or indeed on any branch of

Reasons for the neglect of psychology by the lawyers.

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 397.

(b) C. D. Field, *Law of Evidence*, p. 566.

(c) Ameer Ali and Woodroffe, *op. cit.*, p. 853.

either the civil or criminal law, which could be described as even attempting an adequate treatment of the psychological questions which arise for discussion. What some of those questions are will become sufficiently plain in the course of this work, though it is not claimed that this volume exhausts them : it is merely offered as a contribution to the subject.

We have little doubt that this singular neglect on the part of our lawyers of a subject, the importance of which can be deduced even from their own writings, can be explained mainly on two grounds *viz.*, the prejudice against philosophy in any shape already mentioned and ignorance of what psychology is able to teach. Every lawyer learns the same legal catechism and it contains no vow to study psychology : like the Church he has his creed, but it teaches him that in order to be saved it is not necessary that he hold any psychological faith : his dogmas are as immutable as those of Catholicism and he will not permit himself to look beyond them at anything which might cast doubt upon the doctrines of his sect : any difficulties or inconsistencies that arise he meets with a true ecclesiastical positiveness and a more obstinate re-assertion of principles of the futility of which he is not aware. Hence he condemns with confidence what he does not know and pronounces useless what he has never read : we would wager that the ordinary lawyer when he denounces psychology as unpractical, visionary and the like, is in reality denouncing what is to him nothing more than a name ; that he has never opened the page of a psychological volume but has taken his views entirely on trust from some legal writers whose qualifications to pronounce an opinion on the subject are little better than his own.

It is this frame of mind that we regard as the great hindrance to our endeavour : the fact that our study of psychology has led us in the following pages to attack some presumptions and decisions of law that form the articles of legal belief will, we fear, be sufficient alone with some to condemn us : for, if these legal formulæ are destroyed, what has the lawyer left ? He has spent his life among them and knows nothing else : he explains everything by them, and if you analyse his decisions you will find anything in the way of emphasis on the legal form, anything rather than the effort to grasp the content. It is on the contrary the content to



which we look : it is to help us to understand the matter, the real thoughts and actions of men, that we call in the aid of psychology, for it appears to us that to be content with drawing general presumptions and forcing particular instances under certain legal heads is, in many cases, merely to shirk the difficulty and to make a pretence of arriving at the truth.

“ The suspicion is in the air now-a-days,” writes Prof. James, “ that the superiority of one of our formulæ to another may not consist so much in its literal ‘ objectivity,’ as in subjective qualities like its usefulness, its ‘ elegance ’ or its congruity with our residual beliefs.” (a) We see no signs that this truth has occurred to the lawyers and so it is that we cannot reverence legal formulæ merely as such, many of which seem to us like copy-book headings or caricatures of explanations, and if the applications of psychology succeeds in destroying some of these, we think that something will have been done to lessen the ‘ iniquity of the law ’ which has become a by-word among those who do not belong to the legal profession.

8. We confess then that we are not in sympathy with the present aims or methods of the legal profession, and we think that they do not achieve the results which they imagine. Their claim to administer justice successfully we should dispute, though we are prepared to admit that a genuine effort has been made on their part to attain what we can only regard as a perverted ideal. Many are irritated, we believe, at the self-complacency with which they arrogate to themselves a title to be considered the most intellectual body of men who are at once the sole depositaries of legal truth and above the criticism of others outside their own circle, and it appears to us that this disposition is the result not of merit but of centuries of past blindness to what has been actually going on around them. This blindness still continues and is the bar to the admission of any new knowledge and to the recognition of their own failure to fulfil adequately a direct duty owed to the society which employs them by entrusting to them the administration of justice. It is to meet an attitude of this kind that we have been compelled to be outspoken in our criticisms in the following pages, and if it should be objected that this work is entirely destructive

---

(a) W. James, *Humanism and Truth*, Mind N. S. No. 52, p. 460.



and such results as may be attained purely negative, we should maintain that even so our effort is justified. For it is necessary as a first step to raise some doubts in the minds of the lawyers as to the infallibility of their existing methods and the perfection of their present results, by insisting on the dissatisfaction with their decisions felt by some laymen. This can only be done by attacking the idols which they now worship, and when these have been dethroned we may perhaps venture to hope that they will recognise the existence of other knowledge hitherto ignored by them but which the non-legal mind is unable similarly to disregard. /

## CHAPTER II.

### SOME SPECIFIC DEFECTS OF THE LAW.

Statement of six specific charges against the law—The law cannot be understood by laymen owing to its artificiality—Its use of fictions discussed—The assignment of arbitrary meaning to terms and the use of special technical language in law—The legal employment of ordinary language in a special sense really impracticable—The unduly narrow and restrictive interpretations and procedure of the law retard the discovery of the truth—Its refusal to avail itself of outside sources of knowledge—The treatment by law of expert evidence—This narrowness largely due to the special type of legal education—Effort of the lawyers to attain uniformity and certainty in the law leads to neglect of individual circumstances and consequent injustice—Judges should not be so tied down by rules but should have greater latitude—At present they are handicapped by restrictions of the law—Examples given—The law spoils any instrument it has for remedying its narrowness—Examples, its treatment of equity and certain of the broader provisions of the law—Attempts to extend English law to India—The use of presumptions and general principles—Neglect of the conclusions of other sciences, *e.g.*, moral philosophy, medicine, psychology, the connection with which is not denied—The excessive regard of the law for precedents and the past—Judge-made law—The failure of the law to attain the certainty it seeks—Attitude of the lawyer to criticism by laymen—Reasons why lawyers are not likely by themselves to reform the law—The choice of a Judge—The rules of law founded on a wrong view of life and experience—The nature of experience and reality explained—The meaning and test of relevancy discussed—Illustrations of rejections, exclusions and restrictions in law founded on the wrong view of life and experience—The nature of corroboration explained—Evidence of the want of success of the law and of the opinion of laymen concerning it.

In the preceding chapter we endeavoured to state generally the grounds on which we hold that the law is in need of reform, that the lawyers will not reform it and that they will not listen to what psychology and philosophy teach on the subject. One of the reasons appeared to be that they are satisfied with the law as it stands and are persuaded of the success of their own administration of justice. As this frame of mind must necessarily be a chief obstacle to amendment, we propose in this chapter to give more specific reasons for our conviction that the law as now framed and administered does not produce results which could content the community, and to illustrate more fully particular points in which it is deficient or perverse.

The main heads of our indictment are six, under some of which several sub-heads will be found. (1) The law cannot be understood by the plain man owing to the artificiality of its language and thought; (2) it is unduly narrow and restrictive in its interpretations and procedure, and this retards the discovery of the truth; (3) while admitting its enforced connection with some branches of philosophy and other sciences, it neglects their conclusions and attempts to act as though no such connection exists and in reliance on its own limited sources of knowledge; (4) its excessive regard for precedents and the past and inaccessibility to new ideas; (5) its rules of evidence and interpretation of the law of evidence are based in part on a wrong idea of relevancy and an erroneous view of the nature of human experience and life; and (6) there is clear evidence of the non-success resulting from the preceding conditions.

2. The first way in which the law displays its artificiality is by its use of fictions. We use "fiction" here in the sense in which Sir Henry Maine employs it, to signify "any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." (a) We shall presently explain our attitude towards such fictions. Here we merely point out their existence and that the lawyers defend them on account of their utility, inasmuch as by their means they have been able to introduce ideas which would have been excluded by the legal traditions, to reconcile new decisions with old ones and to deal with and determine questions which come before them, many of which they would otherwise be unable to decide.

Sir Henry Maine defends them as "particularly congenial to the infancy of Society" because they satisfy the desire for improvement which is not quite wanting, and at the same time do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, etc. (b) He goes on

(a) Maine : Ancient Law, 10th Ed., p. 26.

(b) *Ibid* : pp. 26-27.



however, to allow that they should not be stereotyped in our legal system: "There are several fictions still exercising powerful influence on English Jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language of English practitioners; but there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now among other disadvantages legal fictions are the greatest of obstacles to symmetrical classification."

We have not much sympathy with this last ground of objection, for as will appear later, we doubt whether the idea of a science of law is an advantageous one, and not rather calculated to divorce it from real life and intensify its artificiality. But we welcome the expression of these views as a whole because they recognise that these fictions do make the law more difficult to understand and should be a thing of the past. In so far as they are retained to spare the feelings of the legal profession the rude shock of the introduction of new ideas in the form of the real explanations of the matters before them, we regard it as a proof of one of our allegations, *viz.*, that concerning the excessive regard of the law for the past and its inaccessibility to new ideas.

Somewhat similarly Prof. Dicey, when replying to an objection to judge-made law that the Judges have accomplished their end by fraudulently pretending that they were merely interpreting the law, argues that fiction is not fraud and that legal fictions are the natural product of certain social and intellectual conditions. He adds that the progress of civilization has not yet enabled us to get rid entirely of such fictions, particularly in the field of constitutional law.<sup>(a)</sup> Sir William Markby refers to the matter in the following terms:—"This habit of referring everything to intention is shown by that very large class of modern cases in which the Courts insist upon declaring that there is a promise, that there is an intention to create a legal liability, where it is quite certain that no such promise or intention exists. Possibly this practice

---

(a) A. V. Dicey: *Law and Opinion in England*, Ed. 1905, pp. 489—492.

originated to some extent in the impediments to the administration of justice arising out of the rules as to forms of actions. But notwithstanding that the form of an action is no longer material, the 'implied' contract or promise still holds its ground, though it would seem to be simpler to refer the liability directly to the facts as they really exist without resorting to fiction." (a)

Now it is not supposed by us that it is sufficient to point out that a thing is a fiction in order to condemn it : if it answers the purpose for which it has been framed we have no objection, provided that the purpose is a good one, and that it does not produce harm in other respects. As regards the purpose, it appears to us that whatever may have been the use of fictions in the past, they are not needed now and cannot any longer produce a good result. A fiction either deceives a person or persons for whose benefit it has been invented, or, if it fails to do this, it is recognised as a fiction and becomes useless for its original purpose, though it often still has effect as a hindrance and means of obscuring the truth. If the law were in advance of the opinions of society its fictions might still be of value, but we see no sign of this. Sir Henry Maine has stated that social necessities and social opinion are always more or less in advance of the law. The law is stable but modern societies are progressive and the greater or less happiness of a people depends on the promptitude with which the gulf between law and the opinion of the people is narrowed. (b) Now we do not believe that the enlightened man of to-day is in the least deceived by these fictions ; he recognises them as such and sees no use in them, as they are not required either to preserve social order or the authority of the law or for any other purpose. On the contrary, he is tempted to despise the law and charge it with humbug for appearing to act for reasons other than those which it acknowledges. He is further irritated because he cannot find out what are the true grounds on which decisions are given, and therefore feels insecure when there is a prospect of his entering the law courts. The whole thing seems to him artificial, and the lawyers as a class appear either dishonest or antiquated and contemptible for deceiving themselves out of respect for old

---

(a) Sir W. Markby : *Elements of Law*, 5th Ed., pp. 123—4.

(b) Maine : *O. C.*, p. 24.



legal traditions or precepts which they should know do not really cover the cases supposed, for he can conjecture no other explanation of such conduct.

We are thus constrained to condemn fictions in so far as they are either intended to exclude, or actually result in excluding, a recognition of the true state of affairs and the real principles on which decisions are given by the law on the circumstances of daily life with which it is forced to deal. They mystify the plain man and create the impression in him that the law does not aim at the truth : we hold that this should always be the legal aim, and that it is not a sufficient apology to say that the law is only intended to deal with the facts that come before it in a rough and ready way. It is a poor consolation that you have got a decision of some kind, if it is admitted to be a wrong one, or to be probably erroneous, or one that does not cover the facts of the case, or if it is avowedly based on reasons which are not the true ones. Not only has it failed in the proper aim of a decision, namely, that of satisfying the suitor, but by its very existence it has deprived you of the opportunity of getting something better, and our belief is that this is the usual result of accepting fiction for reality.

### 3. But even more mischievous than the employment of actual

The assignment of arbitrary meanings to terms and use of special technical language in law.

fictions is the assignment of arbitrary meanings to terms which conflict with the sense in which they are usually employed by the plain man. Such a use of ordinary language must necessarily mislead and also contribute greatly to the artificial and technical character of the law. As examples of such terms will be found throughout this work, we need only specify here the use of words like "malice," "intention," "fraud," "wilfully," "person," "thing," and then pass on to the admissions of legal writers on the subject and the reasons why such employment of language in our view must be disastrous. The attitude of the lawyers in this matter, if we are not mistaken, is to assert that they are at liberty to give what meanings they like to words, and by fixing such meanings with exactitude they will arrive at clearness and certainty. To this they consider a technical vocabulary to be a great aid. On the other hand, some legal writers at all events are constrained to admit that you cannot attach suc-



cessfully to words meanings different from those which they bear in ordinary use. As regards technicality of language, we are not sure whether they regard it as a blessing or as an unavoidable evil, but we believe them to hold that they are under no obligation to make it intelligible to the non-legal mind, and, if it results from the employment of technical phraseology that the law is not understood of the people, this may be ignored.

A few quotations from legal writers will illustrate clearly. "From this investigation it will appear," says Prof. Sheldon Amos, "that the terms 'person' and 'thing' when used in a strictly legal sense by no means tally with the corresponding terms as popularly employed. The modifications of the meanings of the legal terms are nevertheless determined by strict logical principle and have a definite ethical and etymological history." (a) Speaking of the difficulties of the ordinary educated reader beginning the study of law, Sir Frederick Pollock writes: "He has not only to discover for himself often with much bewilderment, the actual contents of legal terms, but to realise the legal point of view and the legal habit of mind." (b) Again of the English Common Law:—"Like the Roman law, that system is embodied in a special and technical literature governed by its own authoritative conventions, accessible only through its own apparatus of reference, and available for any practical purpose only on condition of understanding its peculiar methods. The use of law books and the appreciation of legal authorities can be fully learned only by assiduous practice." (c) A particularly frank expression of the legal view is the following concerning unwritten law:—"Unwritten law" is the work of trained lawyers, and its character is necessarily professional and scientific. It deals largely in technical terms, 'terms of art' as our law books call them, *which laymen are not expected to understand*. The 'general reader' who should take up at random, for example, a judgment of the Court of Appeal in the current number of the Law Reports, or a case from the early part of the century in a volume of the Revised Reports, *would have no right to expect it to be more intelligible or interesting to him than a modern technical*

a) Sheldon Amos: The Science of Law, Ed. 1889, p. 88.

(b) Pollock: A First Book of Jurisprudence, Ed. 1896. Preface, p. V.

c) *Ibid.*, p. VIII.

*treatise on Engineering or Chemistry*. Doubtless there is no branch of human affairs with which Courts of Law may not have to deal; and an intelligent layman who tries the supposed *sortes juridicæ* may have a fair chance of lighting upon something that concerns his own business, or is connected with some well-known piece of history, or is otherwise of obvious public interest, but still it is only a better chance than other kinds of technical works outside his own special knowledge would offer him. A little reflection will show that law could not be systematic on any other conditions.” (a) In a similar strain Prof. Sheldon Amos writes:—“ The sole purpose of definition is to correct the consequences of the vague and uncertain, or often ambiguous, meanings which have generally become attached to terms largely used in the common speech of the people. The terms of law are very generally also popular terms, and have become infected with all the vacillation and flux incident to words bandied about in the common speech of unthinking people. Furthermore, these terms are apt to contract a variety of peculiar and artificial meanings from the practice of courts of justice themselves; and this fact is the more menacing, as it requires a special professional education to appreciate the various meanings, which are therefore likely to escape the attention of the legislator when he addresses himself to the amendment of existing law.” (b)

The above passages certainly convey the impression that those lawyers regard with equanimity a state of things in which the law is so technical as to be practically a sealed book to all outside the legal profession. It is difficult to understand how in such circumstances they can justify the use of their maxim that ignorance of the law excuses no one, except in so far as it may be regarded as a supreme fiction.

We next turn to some writings which betray less satisfaction at this result and even suggest doubt as to whether the legal employment of language in a special sense is really practicable. “ It is not unusual,” says Sir William Markby, “ to eke out legal expressions by using popular expressions in a very special sense and then to attach to the expression the words ‘ legal ’ or ‘ constructive ’ or ‘ quasi,’ to remind the hearer that the use of the expression is a

---

(a) Pollock : O. C., p. 237.

(b) Sheldon Amos : O. C., pp. 374-5.



special one. Thus we speak of 'legal' fraud where no one has been deceived; of 'constructive' notice, when nothing has been announced; of a 'quasi' contract where there has been no agreement. The poverty of language makes it difficult to dispense with these contrivances. But much care is required in resorting to them, and they are never altogether free from objection. Such an expression as 'legal fraud,' for example, is specially objectionable.

To call a thing 'legal fraud' which is really innocent is very likely to confuse the distinction between right and wrong, and to make people indifferent about incurring charges of fraud." (a)

Again, it is recognised that law cannot separate itself entirely from morality and that what are pronounced to be crimes and offences by law must be acts which are condemned by the moral sentiment of the people. This will be referred to more fully hereafter; here we desire to notice one consequence of it, *viz.*, that the law is forced to employ the same language as morality in order to make it clear that each is condemning the same thing. When it tries to depart from this course and either creates new crimes without the use of a phrase which imports the idea of moral wickedness, or applies such phrases to cases to which moral feeling does not attach them, confusion results, and injustice is apprehended. Thus Prof. Amos says that there are two grounds on which the law is compelled to conduct a quasi moral investigation so often as the legal responsibility of an alleged offender is called in question, namely, that a large number of legal crimes can scarcely be described in any other language than that supplied by the popular dialect of the day, and that their very existence is largely based upon the moral notions and beliefs current at the day. Law is dependent in some measure on the popular sentiments of the day for a general description of large and important classes of crimes, and in such description the element of wickedness or mischievousness occupies a conspicuous place. (b) Sir James Stephen says explicitly that "it is in practice almost impossible to divest words of their natural meaning," (c) and again, when discussing the use of the terms

---

(a) Markby: O. C., p. 116.

(b) Sheldon Amos: O. C., pp. 238—242.

(c) Stephen: Introduction to the Indian Evidence Act, Ed. 1893, p. 7.



“ malice ” and “ malicious ” in English law, he writes that the administration of criminal justice is based upon morality, “ it is therefore absolutely necessary that legal definitions of crimes should be based upon moral distinctions, whatever may be the difficulty of ascertaining with precision what those distinctions are ; and it will be found in practice impossible to attach to the words ‘ malice ’ and ‘ malicious ’ any other meaning than that which properly belongs to them of wickedness and wicked.”(a)

Lastly, Sir Frederick Pollock himself has in the end to make the same admission. Although he states that “ even if the terms were used by lawyers in a peculiar sense, there would be no need for apology ; ” he qualifies this by adding : “ but the legal sense is the natural one.”(b) Elsewhere, however, he goes further : “ The words ‘ just ’ and ‘ justice,’ and corresponding words in other tongues, have never quite lost ethical significance even in the most technical legal context. The reason of this.....is that in the development of the law both by legislative and judicial processes, appeal is constantly made to ethical reason and the moral judgment of the community.”(c) And again : “ With rare exceptions, an act not otherwise unlawful in itself will not become an offence because it is done from a sinister motive,” to which is added the note “ those exceptions are perhaps of an accidental and not very substantial kind ; but after all corrections and allowances, ‘ malice ’ does sometimes in English law mean evil motive, such as personal enmity or vindictiveness.”(d)

We shall now state the reasons why this attempt of the lawyers to employ language in a special legal sense cannot in our opinion be successful and must have harmful results. It would seem that they have never considered what it is that gives meaning to language. Now meaning depends on application, that is to say, application to a particular case, to something that occurs in daily life. When a word has thus acquired a meaning it is impossible to divest it of that meaning and give it another obtained from no such application to particulars, but invented for the purposes of a legal scheme.

---

(a) Stephen : A general view of the Criminal Law of England, p. 82.

(b) Pollock on Torts, 6th Ed., pp. 35-6.

(c) A First Book of Jurisprudence, p. 31.

(d) *Ibid.*, pp. 45-6.

By their attempt the lawyers have shown that they do not realize that there are certain notions expressed by certain terms which have proved of such use in getting our experience into a shareable and manageable shape, that they have become part of the very structure of our mind. We cannot play fast and loose with them. No experience can upset them. On the contrary, they apperceive every experience and assign it to its place. Our thoughts must still employ them if they are to possess reasonableness and truth.(a) Let us try and consider what must happen when the attempt is made. If you take a word like "malice" or "intention" which stands for something known to the experience of the ordinary man, and apply it to something else not so experienced, you clearly make use of a fiction. But by the use of this fiction you cannot abolish the reality, although you may try to do so by speaking of a "legal sense," "excluding from law," etc.; you must at least always keep in mind the two meanings of the term in order to distinguish them and prevent the intrusion of the popular sense which you believe will be mischievous in law. And now mark the result: your working fiction must not be allowed to distract you from the attentive study of the genuine fact, and the full nature of the genuine fact, when you apply your fiction, must be kept resolutely out of view. Otherwise neither can you profess to be dealing with the real thing that is before you, nor can you possibly succeed in applying your key to the situation; and this feat has to be performed in the course of one and the same investigation. We do not believe that it can be done, but confusion is bound to result, of which we have given examples in the course of this volume: but at all events, if we are mistaken as to the possibility of this feat on the part of the lawyers, we feel certain that the plain man is unable to follow them and hence he is bound to be dissatisfied with interpretations of the law which he cannot comprehend.(b) If the law were to invent entirely new terms as counterparts of the new states of mind, etc., which it also invents, instead of taking terms which already have an established meaning, it would avoid the confusion which springs from a struggle against language when you try to force on your words a signi-

---

(a) Cf. W. James: *Humanism and Truth*, pp. 63-4.

(b) Cf. F. H. Bradley on Conation, *Mind*, N. S. 40, p. 448.



ficance inconsistent with the one they already bear : but the price to be paid would be too heavy. It would then persuade no one that it was dealing with events and occurrences of real life. It would be openly regarded as concerned with unrealities and fictions and of interest chiefly as an antiquarian science. Men would not allow their affairs to be determined by it. Its one hold on reality is that it uses the terms of everyday life, and, so long as it does this, however artificial and technical it may really be, it does appear to have sufficient connection with facts for men to put up grudgingly with its decisions hoping for gradual reformation.

We are tempted to refer here to a criticism made in a leading English daily paper on the first edition of this work, as it appears to us to be an instance of the view which we wish to combat. The writer said :—“ Half of the criticisms of the legal use of ‘ intention ’ for example are due to forgetting what the lawyer has in view ; he is not engaged in a psychological analysis, he is thinking of acts which it is useful to attempt to prevent. To quote Ribot or Wundt, and to contrast their remarks with legal reasoning as to the same acts is to forget the differences, obvious and fundamental, between the objects of the psychologist and of the lawyer.”

Our reply to this is that, if there is a fundamental difference of view and object between the two, there ought not to be, and it is not the fault of psychology. It has been pointed out in Chapter I, that psychology is the common foundation of the Social Sciences, including law, inasmuch as it formulates the body of ascertained truths about the constitution and working of the mind. One branch of it explains the springs of human action, the impulses and motives that sustain mental and bodily activity and regulate conduct. In these must clearly be included intention. If, therefore, the law deals, or tries to deal with real human conduct, it ought when treating of intention to be treating of the same matter as psychology. If it does not do so, it is treating of something foreign to human nature which is of no interest to mankind. For the psychologist when analysing conceptions such as intention, will, motive, etc., does not invent these terms, but takes the words as used by the ordinary man to describe real existing mental states, and does not employ them in any special or technical sense. His intention is to reveal more fully by his analysis what meaning the word really



contains and to show how the mental process is brought about and what it does. If the lawyer is using the word in a different sense, as we understand this criticism to imply, it is the very practice against which we are protesting, partly because we do not believe that another meaning can really be given to it consistently, and partly because it appears to us to lead to injustice in some cases in which we do not think the community would acquiesce, if they were aware of what the law was actually doing. In this very instance of intention we argued that by using a presumption which imports intention into cases to which, as shown by psychology, there is no intention in the sense understood by the plain man, the law causes some men to be hanged for murder whom the community did not intend to be so punished when they framed the law. It likewise causes others to be mulcted in damages and penalised for fraud in civil cases whom the community never desired in their legislation to be treated in this way. It appears to us no answer to this to say that the lawyers when they do this, are not thinking of intention as ordinarily understood, but of acts which it is useful to attempt to prevent.

They have received no mandate to extend the law in this fashion ; although they may draft Acts and Statutes, legislation is the work of the representatives of the community, and is intended to express what they think right, and the language employed in it is meant by them to bear its ordinary use. When the lawyers introduce their special meanings a result ensues which was not expected by the community, which becomes confused and feels in some cases that injustice is being perpetrated because the penalty is not in accordance with the moral sentiment on which, as we have seen, the existence of law really depends. It feels that it has been deceived inasmuch as ordinary language has been perverted to cover an object which was not proclaimed at the time of the legislation, and the reply that in the lawyer's opinion it is useful to attempt to prevent such acts does not appear adequate. As a matter of fact the legal text-book writers and Judges, whose decisions we have read, do not make this reply. They attempt to justify the decisions in such cases by arguing that they are really in accordance with what Society thinks or as much in accordance with it as the law with its difficulties of administration can effect. As this critic

has not thought it worth while to make such an excuse, it appears that either he has openly taken up the ground that the lawyers have a right to introduce their own legislation without reference to the community and in this tortuous manner, and has thereby shown that he is ignorant of what is the real position of lawyers in the matter ; or he is under a misconception as to what psychological analysis really is.

4. Our next objection to the law is the narrow and restrictive point of view which it appears to us to adopt wherever possible. This is shown in various ways, and firstly in its refusal to avail itself of outside sources of knowledge. We are not referring now to its neglect of the conclusions of philosophy and other sciences which will be noticed later, but to the obstinacy of the Judges and legal writers in refusing to make use of sources of information connected with the law itself but which are not contained in a Statute or legal text-book. Thus it has been adopted as a rule that the meaning

The law retards the truth by its unduly narrow and restrictive interpretations and procedure.

Its refusal to avail itself of outside sources of knowledge.

of a provision of law must be ascertained from the words of the Act itself, and the Court is not at liberty to refer to the statement of objects and reasons which were drawn up to explain the purpose of the law at the time of its enactment, nor yet to the speeches of the members of the Select Committee who explained it in the Legislative Council.(a) Yet where could one expect to find more likely assistance when doubt arises as to the meaning of some clause than in these expressions of views of the very framers of the Act ? Nevertheless they are rejected simply because they do not come from a Court of Law. Similarly Mr. J. D. Mayne regards as of little weight the draft Penal Code and the reports of the Commissioners thereon which the High Court of Calcutta consulted on a difficult point relating to theft(b) and doubts whether it was allowable to use them.(c) It is difficult to conceive what can be gained by such an attitude, while it would seem to be at least

---

(a) *Administrator-General of Bengal v. Prem Lall Mullick*, I. L. R., 22 Cal., 788, s. c. L. R., 22 I. A., 107 (1895).

(b) *Prosonno Kumar v. Uday Sant*, I. L. R., 22 Cal., 669.

(c) Mayne : *The Criminal Law of India*, 3rd Edn., p. 733.



probable that much may be lost which otherwise would help to elucidate the truth.

When, however, the lawyers are forced by public opinion to go outside their own bounds and call in expert aid, their chief idea seems to be to tie down the expert witness, so that he can give as little evidence as possible. He is thus rendered, of course, of little assistance. Further, if this evidence is not in accord with the traditional opinions of the law, as is often the case, the legal view in such matters being usually antiquated and unscientific, he is not unlikely to be insulted and disbelieved on the ground that he is biased. Below are illustrations of what is meant.

A doctor is called as a witness in a case in which insanity is alleged on behalf of the accused. He is not allowed to give evidence that he considers the offender was insane by reason of an uncontrollable impulse and to explain his reasons therefor, because the law has already decided on non-medical grounds that no such type of insanity exists. We may cite as examples of the manner in which lawyers recommend expert evidence should be treated the following passages :—" The evidence of experts is to be received with caution, because they may often come with such a bias in their minds to support the cause in which they are embarked, that their judgments become warped, and they themselves become, even when conscientiously disposed, incapable of expressing a correct opinion." (a) " An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by persons who call him. . . . Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you." (b) It is not surprising when this view is taken of medical evidence, that writers like Dr. Maudsley, Dr. Albert Wilson and Dr. Conolly speak so bitterly of the law. Thus Dr. Maudsley says that when physicians testify to the existence of less marked forms of insanity they are thought by the lawyers to be propounding ingenious and fanciful theories in order to exhibit their own cleverness, or to be so biased by the nature of their studies as to detect insanity wherever they set to work to look for it ; and

---

(a) Ameer Ali and Woodroffe : The law of evidence applicable to British India, 5th Edn., p. 398.

(b) Jessel, M. R., in *Abinger v. Ashton*, L. R., 17 Eq., 373.



he speaks of the ridicule that is poured upon them.(a) Dr. Albert Wilson writes :—" The pathology of degeneracy is comparatively new, but the legal profession will not depart from dusty tradition concerning it. What we give as truth and fact upon which to build an intelligible and righteous law, they interpret as sympathy and sentiment." (b) Dr. Conolly speaks of the " severities of the bench frowning down psychological truth." As regards the psychologist, Professor Munsterberg points out that the educational expert and the physician have begun to use him in their professions but not the law. " An abundance of facts has been secured by experimental methods which might be helpful in the prevention of crime, in the sifting of evidence and in the securing of truthful confession. Every word of the witness depends on his memory, on his powers of perception, on his suggestibility, on his emotion, and yet no psychological expert is invited to make use of the psychological achievements in this sphere." (c) Detailed examples of what Professor Munsterberg refers to will be given later ; here we are merely drawing attention to the fact that the lawyers decline the psychologist's aid. Their attitude as regards expert evidence we should sum up by saying that they exclude it where they can and snub it or seek to discredit it when they cannot exclude it. In this may be recognised the usual suspicion born of ignorance and narrowness.

5. The root of the trouble appears to be that, as the effect of a particularly specialised and restricted education, the lawyer loses all imagination and becomes intellectually pinned down to his one narrow subject. He is unable to suppose that anything different from what he has seen or learnt can be true or have any value to him, and he therefore makes every effort to confine what comes before him to the range of his own ideas. In pursuance of this object he invents a procedure and puts forward a number of doctrines and presumptions which appear to be designed to exclude discussion and examination of facts as far as possible. He further adopts a method of interpretation which will limit the power of individuals to think for themselves or stray

The narrowness of the methods and interpretations actually used.

(a) H. Maudsley : Responsibility in Mental Disease, 5th Edn., p. 69.

(b) A. Wilson : Unfinished Man, p. 128.

(c) H. Munsterberg : Problems of to-day, p. 153.

outside the conventional paths and keep them tightly under the control of Appellate Courts. His ideal he would describe as uniformity and certainty in the law, and we do not dispute that such an ideal is a worthy one, but it is possible to carry it to excess. The law has to deal with the affairs of human life which are infinitely diverse and varied, and we do not think that such differences can be excluded from consideration without injustice resulting. Nor do we think that as a matter of fact the procedure which has been adopted attains its end, but rather causes infinite trouble, and often lengthens litigation and renders its ultimate issue uncertain.

It is assumed by lawyers that every one uses the same logic, *viz.*, that of the law. This is not so. Just as the drunken man uses a different logic from the sober one, and the child from the man, so there are many forms of particular logics which different men use. The mystic uses a wholly personal and particular logic with reference to his relation to God, and all religious persons argue and believe quite differently with reference to religious matters and to ordinary life. A reasonable man, it has been said, when engaged in prayer assumes miracles, but when engaged in business he admits no miracles. Lovers also look at things differently from the uninspired. In short law has never grasped that in the ordinary affairs of life men are as much guided by feeling as by reason: exaggerated instances may be seen of this in the behaviour of crowds and even of trades unions. Now if for the sake of uniformity the actions of all persons are to be judged in all they do by the one artificial standard employed by the law, many are certain to be misunderstood when they come into the law courts, as, for example, the Quakers formerly were, and the Christian Scientists now habitually are. The law will perhaps reply that it cannot provide for all these different ways of looking at things. To this we agree, but we do not ask it to do so, but on the contrary to attempt to provide less than it now does by its rules. If it would only leave it to the Judge to make allowance for them and not tie him down by its rules, presumptions and appeals and prevent him from doing so, and if it would further see that he was educated at the outset in a more liberal way, the difficulty would be overcome, and we should hear less complaints of injustice. At present it appears to us to try and handicap him as much as it can in several ways.



In the first place it restricts the materials he can use for ascertaining the truth, quite apart from the question of relevancy which will be treated of later, by putting unnecessary difficulties in the way of proof. Examples of this are the elaborate provisions which it has laid down as to the steps by which the identity of persons by finger impressions must be established, though it should be obvious that this is not a matter in which there is much room for mistake. Again, its attitude with respect to admitting the evidence of absent and sometimes deceased witnesses is unnecessarily restrictive. Although sec. 32 of the Indian Evidence Act provides that the statements on certain points may be admitted of persons who have become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, the law has in its usual way fettered the discretion of the Judge by all kinds of rulings which have the result of making it extremely difficult to admit such statements. Also evidence given by such a witness in a judicial proceeding is only admissible in a subsequent judicial proceeding under several restrictions laid down in sec. 33 of the same Act, one of which is that the adverse party in the first proceeding must have had the right and opportunity to cross-examine. Rulings have been given to the following effect:—That in the case of illness the incapacity must be of a permanent and not of a temporary kind, that the illness must be proved by a doctor, that inconvenience to witnesses is no ground to be considered, that a fortnight's delay is not sufficient, that it is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, that it is doubtful whether the expense referred to can include the expenses of adjourning the case, and when after adjourning a case once for a witness he did not appear on the second occasion, and a Session Judge admitted his evidence before the committing Magistrate, the High Court held that the evidence could not be used.(a) One would imagine that all such points would be left to the decision of the Judge trying the case, which very possibly was the intention of the framers of the Evidence Act, and, if that Judge were at liberty

---

(a) All the above cases will be found quoted on pp. 333—335, Ameer Ali and Woodroffe's Evidence Act, 5th Edn.



to disregard the above rulings, no harm would be done. But unfortunately this is not the case : these rulings are reproduced in the text-book quoted to serve as precedents, and, if the Judge neglects them, they become the foundation of arguments for upsetting the decision in the Appellate Court or obtaining a new trial, which is very likely to happen because, as stated above, it is the practice of the higher courts to take a narrow view and allow the subordinate Judges no discretion for the sake of securing uniformity and certainty in the law. Other hindrances put in the way of the Judge are the provision in English law that copies of documents may not be used by a witness to refresh memory<sup>(a)</sup> and the rule that documents which require to be stamped with a one-anna stamp in India, if not stamped, cannot be afterwards admitted on payment of stamp-duty and penalty nor yet can oral evidence be given of their contents. Similarly with respect to documents required to be registered but which were not registered at the time of execution. It has also been ruled that if the depositions of witnesses are informally recorded they are inadmissible in evidence, and no other evidence of the deposition can be given, thus excluding the whole evidence of a witness on account of a technical rule of procedure.<sup>(b)</sup>

In the actual trial of cases the Judge is further hindered by artificial rules of procedure, and suitors are hampered by having to comply with arbitrary restrictions. We have only space here to allude to a few of these. In the matter of placing the burden of proof on one party or other and shifting it during the stages of the case from one side to the other, strict and intricate rulings exist. Messrs. Ameer Ali and Woodroffe find it necessary to occupy forty-three large pages of their commentary in explaining these rules with reference to sec. 104 alone of the Evidence Act and their whole chapter on the subject extends to considerably over a hundred pages. Nor can it be asserted that all this is unnecessary when we find cases decided almost wholly on this one point, as *e.g.*, *Makund v. Bahori Lal*<sup>(c)</sup> which was twice appealed on this ground, the decision being first reversed and then restored again. Yet so far as the ascertainment of the truth was concerned it should have mattered

---

(a) p. 901, Ameer Ali and Woodroffe's Evidence Act, 5th Edn.

(b) *Ibid*, p. 564, note (6).

(c) I. L. R., 3 All., 824 (1881).

little which side produced its evidence first. An instance of a restriction of the kind meant is the practice of the law in ruling out the ordinary remedy because the plaintiff has not taken advantage of some other remedy in law. Thus, a person dispossessed who does not bring a suit for possession in six months' time under the Specific Relief Act cannot later bring an ordinary suit for repossession on the strength of his previous possession. The law of estoppel again is both extremely restrictive and artificial, and seems designed to shut out the truth in some cases. As the manner in which it is employed is described at length elsewhere, it will suffice here merely to quote what is said about it by some of the commentators : " Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the peculiarities of the English special pleading and the fact that the effect of prior judgments is usually treated by the English text-writers as a branch of the law of evidence and not as a branch of the Law of Civil Procedure.(a)

Perhaps, however, the lawyers' passion for narrowing and restricting is shown most conspicuously in their interpretations of the actual language of the law and by their success in limiting and rendering technical any provision of the law which appears to give the least opening to a broad-minded judge. As we could hardly do justice here to the first charge by a few quotations, we have attempted to illustrate more fully the spirit in which the lawyers achieve this part of their task by collecting some instances which will be found set forth in Appendix I. We think that these examples will convince most readers that when the Judges have to interpret a Statute or give their decision as to the scope of any powers, they habitually adopt the narrowest conceivable view, and support their opinions by technical arguments and fine distinctions that would not occur to the mind of the ordinary man. This being so, it is also not surprising that when the law has a chance of widening itself it spoils its instrument by making it technical. A very marked instance of this is the case of Equity. Equity, as is well known, was introduced as an instrument to make up for the deficiencies of the law and enable the Judges to soften its rigidity by using their

---

(a) Ameer Ali and Woodroffe, O. C., p. 628.



discretion in circumstances which called for some relaxation. By the usual process, however, of utilising past decisions, as precedents, and so collecting a body of fixed rules for the guidance of the Courts, equity has long since become as technical as the rest of law, and the Judges are as much restricted in the use of it as they are in any other branch. Of this legal writers make no secret, doubtless because they approve the result. "As regards morality," says Sir William Markby, "Austin's opinion seems to be that Courts of Equity do not, now at any rate, enforce morality as such; that the notion of Courts of Equity being Courts of Conscience is obsolete, and that the rules on which the Courts of Equity proceed are as much rules of law as any which prevail in ordinary Courts." (a) And again under the heading "Why Equity has become comparatively rigid" he writes:—"Notwithstanding this, equity has to a great extent lost in England that feature, which at first sight it would seem easiest to preserve, namely, its elasticity.....I venture to think that it is also due in part at least to the very different conception of law itself by modern lawyers, and to the great importance which is now attached to the stability of law, and to the necessity, in order to secure it, for a complete separation of legislative and judicial functions.....When the separation has taken place, then the flexibility and adaptability to special circumstances, which are the very essence of the remedial functions of Courts of Equity, conflict with the idea that the rules to be administered are rules of law and with the conception of law which now prevails in jurisprudence. In as much, however, as the rules of equity have a tendency under the influence of precedent to become rigid, their elasticity depends on the same causes which give elasticity to the Common Law, etc." (b)

Sir Frederick Pollock gives the following description of it:—"When the benefit of the King's Equity was once a matter of right, it was inevitable that the rules of equity should become as methodical as any other part of the law. Blackstone could already say with truth that the system of our Courts of Equity is a laboured connected system, governed by established rules and bound down by precedents. Much fuller development in the same direction took place in the generations following Blackstone. Our equity jurisprudence,

---

(a) Markby: Elements of Law, p. 12.

(b) *Ibid*, p. 75.

to use the accustomed phrase, has been formed altogether by the work of learned persons having a great deal of real power at their disposal, and consciously using that power to produce a systematic doctrine. It therefore answers the description of ' scientific law ' more exactly than any other part of our English legal materials, and perhaps more exactly than any other modern form of ' unwritten law.' "(a) Professor Amos says that at the present day the rules of equity are little less inelastic than rules of common law(b) and relies on the discretionary power of punishment and the prerogative of pardon as devices for bringing the law into closer accord with the requirements of abstract justice. However it may be in England, in India the Higher Courts are rapidly doing their best to abolish any real discretion in the matter of punishments by closely watching every sentence passed and calling on revision for cases in which the sentence does not conform to a kind of fixed standard which they appear to have adopted for each offence. It was not long ago that the Chief Court of Burma laid down a direction that in murder cases where it was doubtful whether a death sentence was appropriate, the capital sentence should be passed by the Sessions Judge, and it should be left to the High Court to confirm it or not, thereby restricting the discretion of the Sessions Judge in the most important of all cases. This instruction was popularly known as the " when in doubt, hang " rule ; it has fortunately been abolished now.

Just as equity has been blighted by the legal touch, so also has it been with the Law Merchant, as shown by the following description of it.—" The development of the law merchant as part of the common law of the English-speaking world has continued without ceasing. Being thus embodied in our system of legal precedents, it has inevitably lost something of its closeness of touch with actual mercantile practice. It is as much " scientific " as any other branch of English case-law, and the reasoning of trained lawyers on the settled rules of the law merchant does not always bring out results which appear to men of business to satisfy the requirements of commerce." (c)

---

(a) Pollock : A First Book of Jurisprudence, p. 244.

(b) Sheldon Amos, O. C., pp. 34 Sq.

(c) Pollock, O. C., p. 271.



Owing to the usurious rates of interest charged by money-lenders in India a special addition was made to section 74 of the Indian Contract Act to enable Judges to refuse to enforce these unconscionable bargains and to substitute a fair rate of interest in lieu thereof. This section has, however, been made nugatory by the decisions of the Courts which have narrowed its application to so few cases, that it can rarely be utilised now. Likewise with the provision in the same Act forbidding the enforcement of contracts which are contrary to public policy. The expression is a wide one and was evidently intended to be capable of application to that class of contracts whose results are injurious to the community in many ways, but fall outside the various specified grounds which render contracts void. The attitude of the High Courts, however, has been to fix on a few heads of a glaring type, such as contracts to promote immorality, and to refuse altogether to enlarge this narrow group. If a Court ventures to apply the section to any contract for which it cannot quote one of these precedents, it may count it a certainty that its decision will be upset on appeal.

A particularly favourite way in which the Judges succeed in restricting the powers given by a Statute is by cutting down any general rule-making power which an Act may contain. It is not uncommon when enumerating the various purposes for which rule may be made by a Local Government or Authority under some Act to add a clause of more general scope, so as to include some purpose which may be found necessary for the administration of the Act, but which may not have been covered by the preceding clauses. Instead of allowing the words to have their natural meaning the Courts say that this clause is subject to the general purpose of the Act which they affect to discover in a line of the limited preamble, and so whittle down the effect of the sub-section that it is not possible to frame any rule under it that could not be already made under the preceding sub-sections. A similar line is pursued when they find a section which appears to their narrow view to be unduly wide in its terms : the device then is to declare that it is intended to be subject to some other section, although there is nothing in the wording to support this, and sometimes even when its terms indicate the contrary. Thus sec. 11 (2) of the Indian Evidence Act runs :—“ Facts not otherwise relevant are relevant (1) ..... (2)

If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable." Now this, if interpreted naturally is the widest and most valuable section in the Act, as it allows the judge to admit in evidence most matters which can help him to discover the truth, and further leaves him to judge for himself which such matters are. This will be demonstrated more fully hereafter. But the lawyers are frightened at its general terms and seek to narrow it, arguing that "if an improperly wide scope be given to the section, the latter (*i.e.*, this clause) might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy." (a) Sir James Stephen therefore explains that "the meaning of the section would have been more fully expressed if words to the following effect had been added to it: 'No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act.'" (b) This interpretation, however, as pointed out by Messrs. Ameer Ali and Woodroffe, does not accord with the words "not otherwise relevant" in the opening part of the section; nevertheless they lend their support to it, saying that it is shown to be the meaning by the special provisions in the following part of the chapter. (c)

Another wide section which these commentators will not allow to have its proper application is sec. 165 of the same Act. This provides that "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by the Act to be relevant, and duly proved, etc., etc." This was doubtless intended to enable the Judge to obtain information

---

(a) Cunningham: The Indian Evidence Act, 103.

(b) Stephen: Introduction to the Evidence Act, p. 161.

(c) Ameer Ali and Woodroffe, O. C., p. 156, and note (5) there.



which he wanted which was not produced before him by the parties or which would not be admissible in evidence under the other sections of the Act. That Sir James Stephen so understood it appears from a speech he made on the Bill in the Legislative Council in which he said : “ In the first place, if the Judge wishes to know about any fact, the relevancy of which is under debate, he can cut the matter short by asking about it himself under sec. 165.”(a) But the commentators on the strength of the words “ in order to discover or to obtain proper proof of “relevant facts,” assert that there is no relaxation of the rules previously laid down as to relevancy, and all that the section enables the Judge to do is to ask questions in order to ascertain whether the case is or is not (or may be) proved in accordance with those rules.(b) Sir William Markby, however, appears to doubt this view.(c)

6. It was stated above that we had some doubt as to the exact view which the lawyers take of the advantages of using artificial and technical language in the law. This doubt was due to the language of the Law Commissioners when reporting concerning the draft of the Indian Evidence Act, and to some of the speeches of Sir James Stephen in which he defended the framing of such a measure. Thus the Commissioners in their fifth Report stated that it would be inadvisable to adopt for India so artificial a system as the English law of Evidence under which a great deal of evidence which, if duly weighed and dispassionately considered, would tend to the elucidation of truth, is absolutely excluded.(d) Similarly Sir James Stephen criticised the English law somewhat severely on the ground that a most important part of it (that relating to hearsay) was “ thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.” He also added that the English theories that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions

Other examples of  
the same spirit.

(a) Ameer Ali and Woodroffe, O. C., p. 974.

(b) *Ibid*, p. 912.

(c) Markby, Ev., 114, 115.

(d) Ameer Ali and Woodroffe, O. C., pp. 939-40

between the prosecutor and the prisoner were not at all suited to India.(a) He defended the Bill as being less technical than the English law, and laid stress on sec. 167, which has been introduced to prevent as far as possible a new trial or reversal of a decision on account of improper admission or rejection of evidence, condemning the English practice on the subject.(b) But that this is not the spirit in which other lawyers look at the question is frequently apparent. Their object seems to be to introduce English law wherever possible into India in spite of its more technical and artificial character. Section 18 of the Evidence Act leaves it to the Court to decide when statements made by agents are expressly or implicitly authorised by the principal. Commenting on this, Messrs. Ameer Ali and Woodroffe cite numerous English law cases on the doctrine of agency, and then add that although this section leaves it to the Court to decide the matter, it is apprehended that the Courts will be guided by the principles laid down by the English and American cases and text-writers,(c) such is their inveterate desire to tie down judges by rules.

Again, Sir Frederick Pollock, speaking of the administration by English authority of foreign systems of law which actually prevail in particular British possessions and in particular of the personal law of the Hindus, Mahomedans and others in British India, says :—  
 “ In those jurisdictions the law of England is itself, properly speaking, a foreign law which can be cited only by way of illustration. But the tendency of both advocates and judges in all jurisdictions is to use and rely on the books with which they are most familiar, even if they be not properly entitled to be treated as having authority in the law discussed and applied by the Court. It would seem at first sight rather difficult to import English technical notions into the administration of Hindu or Mahomedan law, conducted with professed regard for the native principles and authorities of each system. But experience has shown that with the best intentions, the difficulty is to avoid doing this, and the tendency is by no means confined to British or English speaking lawyers.”(d) This,

---

(a) *Ibid*, pp. 962-3.

(b) *Ibid*, p. 974.

(c) Ameer Ali and Woodroffe, O. C., p. 225.

(d) Pollock, O. C., p. 327.



of course, is the natural result of sending out middle-aged Barristers to be Judges of Indian High Courts. They will not learn fully the particular laws of the new country, and prefer to foist on the people the principles of English law which they already know ; these decisions are treated as precedents and soon no one feels certain as to what is the correct law in the matter. Sir William Markby, feeling a similar difficulty about introducing the English system of equity into India, calmly advises that no equity be applied there at all.(a) Other instances may be seen in the endeavours of Mr. J. D. Mayne to convert the law of defamation in India into a complete counterpart of the complicated English law of libel,(b) and in the exposition of estoppel by Messrs. Ameer Ali and Woodroffe taken from the English law in the teeth of the word "intentionally" in section 115 of the Indian Evidence Act, on the ground that the rules of law on estoppel laid down in the Evidence Act are not exhaustive nor do they enact anything different from the law of England on the subject.(c)

Likewise may be cited the use of numerous presumptions taken from English law. This method can only be regarded at the best as a very artificial one to be resorted to as little as possible. What we object to is not a system by which the Judge draws his own presumptions from the facts before him, but one in which he is called on to make fixed presumptions often resting on the flimsiest basis of fact, taken from the law books and arranged in a kind of hierarchy by which one gives way to the other in certain circumstances, and so forth. Thus the presumption of innocence is said to be stronger than the presumption of payment, continuance of life, or of things generally, and of marriage ; but is less strong than the presumption of knowledge of the law or of sanity.(d) It was regarded as a merit by Sir James Stephen that the number of these presumptions had been cut down and inserted only as illustrations to section 114 of the Evidence Act, which is drawn in general terms.(e) But this has not prevented our commentators and judges

---

(a) Markby, O. C., p. 77.

(b) Mayne : The Criminal Law of India, Chapter XIV.

(c) Ameer Ali and Woodroffe, O. C., pp. 756, sq.

(d) Lawson : Presumptive Evidence, 582.

(e) Ameer Ali and Woodroffe, O. C., p. 973.

from introducing others wherever they can, and using them for two purposes, among others, to which there is special objection. The first of these is the practice of using such a presumption to throw the burden of proof on the accused in some cases to exonerate himself from the guilt presumed from an act on his part the nature of which does not justify the presumption made. Instances of this are given elsewhere in the chapters on Intention. The other is to use a presumption either of fact or law to tie down the Judge to regard evidence in a particular manner instead of leaving him to look at it in the way the facts suggest to him. Examples of this are the various presumptions laid down as to the reliance to be placed on the evidence of accomplices and the manner in which it should be corroborated, and as to the use to be made of confessions and admissions. Allusion is made to some of these in Appendix I.

Akin to this use of presumptions to shorten labour and to restrict Judges to certain points of view, is the employment of so-called general or fixed principles to avoid an adequate enquiry into the particular facts of individual cases and the necessity of making allowances for special circumstances. Examples of this are given in many parts of this work and particularly in the chapter on the Normal Man. The artificiality of this method is exposed by the frequency with which it has in fact to be departed from in order to preserve an appearance of dealing with realities and the fictitious nature of the arguments employed to demonstrate that no such departure has taken place. We believe that such principles are really nothing but a hindrance to the Judge and do not secure any real certainty in the law, but sometimes produce injustice. The argument of the following passage of the late Professor Jevons applies very truly to them : “ A rule of law is grounded on a recognised probability of good arising in the opinion of the law-giver from a certain line of conduct. But as there must always occur cases in which this tendency to good is over-mastered by some opposite tendency, the law-giver proceeds to enact new rules limiting, as it is said, but in reality reversing, the former one in special cases. Lawyers, as well as philosophers, delight in discovering euphemisms adapted to maintain the fiction of universal principles. When the principles fail to hold good, it is said that the cases are



exceptional. It is a general principle that a man may do as he likes with his own property. It is an exception when a Railway Company forcibly takes possession of his land. I venture to maintain, however, that we shall do much better in the end if we throw off the incubus of metaphysical ideas and expressions. We must resolve all these supposed principles and rights into the facts and probabilities which they are found to involve when we enquire into their real meaning."(a)

We here conclude our remarks under this important head. Apart from the lamentable effect such artificial technicalities and restrictions have on the minds of the generality of Judges, it appears to us that they fail of securing the certainty and fixity of the law which is desired. The restrictions being against the true nature of things, they cannot always be maintained, and when a broad minded Judge has to decide he tries to evade them or uses some argument which is not really permissible under the accepted law. Hence we get contradictory decisions, and the law, instead of being more certain, becomes less so. The restriction originally made is got out of under the sheer pressure of the case, by importing some permission or intention which it would naturally exclude. This is dissented from in the next case where the pressure of the facts is less or the Judge more narrow-minded.

7. The point of this charge is that law is forced by the questions which it has to decide to admit its connection with outside sciences which have studied and deal in detail with those matters : but it nevertheless seeks to preserve its narrowness and artificiality by refusing to make use of their conclusions. Most conspicuously is it connected with moral philosophy. Indeed it is not attempted to deny that a system of law founded on rules and notions which were not in accord with the moral sentiments of the day could not stand. Professor Sheldon Amos allows that in criminal law legal, moral and political considerations are so intimately blended with one another, that in

The admission of the law of its connection with other sciences but its neglect of their conclusions.

Its connection with moral philosophy.

---

(a) W. S. Jevons : The State in Relation to Labour, 3rd Ed., 1894, pp. 16-17.

treating of it these considerations must be taken into account. But he immediately goes on to say that his plan will be to guard sedulously against any confusion of them with such as are only legal in the most strict and technical sense.(a) He also states that law looks pre-eminently to men's acts and only to thoughts and feelings, to which morality chiefly looks, so far as is needed to explain the real character of men's acts.(b) We have already cited in paragraph 3 of this chapter some admissions of legal writers that when they employ the terms of moral philosophy such as "justice," "malice," etc., they cannot depart from the ethical meanings which such words usually bear. Further than this, the lawyers find that they cannot in fact condemn and punish men without importing into their charges some phrase which implies moral obliquity on the part of the offender. Thus Sir William Markby draws attention in the law of torts to the fact that the act or omission which is said to be an injury is generally qualified by some adverb apparently intended to indicate the required test of liability. Of these he quotes, fraudulently, dishonestly, maliciously, knowingly, intentionally, wantonly, malignantly, rashly, negligently, wilfully, wickedly, imprudently, clumsily, forcibly, with a strong hand, violently, riotously, tumultuously, in large numbers, wrongfully, feloniously, unlawfully, illegally, injuriously and unjustly. These more or less imply that the state of mind under consideration is, when tried by some standard which the person using the expression has in view, not what it ought to be, and he concludes that it is something in the nature of a moral standard.(c) Professor Amos similarly remarks that "the peculiar relations of legal to moral ideas in the region of criminal law is especially marked in the use of such terms and expressions as *dolus*, *dolus malus*, malice and malice afore-thought. Such language occurring in formal criminal indictments, enhanced as it is in some countries by direct reference to the deplorable religious condition of the culprit, certainly would seem to point to "wickedness" in the purely moral sense being the final test of criminal liability." He adds

---

(a) Amos, O. C., p. 228.

(b) *Ibid.*, p. 32.

(c) Markby: Elements of Law, pp. 327-9.



that the criminal law has thus strained itself to become co-extensive with the canon of moral duty, but the effort was in vain.(a)

This being the position, one would have thought that the lawyers would have gone to the Sciences which particularly studied these moral notions, *viz.*, moral philosophy and to some extent psychology, in order to obtain the most correct ideas available concerning them. One would also have expected to see some trace of such influences in the matter of sentences and punishments and the ideal of justice aimed at in the law. We find nothing of the sort. They neglect psychology altogether, and as regards moral philosophy we find the curious attitude taken up that, inasmuch as moral ideas constantly change, if law were to follow these undulations, its progress as a science would be retarded. If they see another nation adopting a different view, they pride themselves that English law has avoided such an error. The following passage is, we think, instructive :—

“ It is obvious that when the majority of persons use the terms ‘ right,’ ‘ ought,’ ‘ duty,’ ‘ crime,’ ‘ malice,’ ‘ fraud,’ they pay little attention to the construction which is put upon those important words in a Court of Justice. Still less are they thinking of the great logical exactitude in the use of every one of those terms which the practice of a Court of Justice demands. They use the words generally in a moral, rather than a legal sense, or, at the best, in a legal sense more or less strongly tinged with a moral sense. It cannot be denied that the best and most philosophical thinkers of Germany, cognizant as they are of the true relations of law and morality, and of legal and moral terms, have to a certain extent contributed to this popular confusion by their reluctance to abstract, even provisionally, law from its surroundings. This abstraction has nowhere been so completely achieved as by Englishmen. The result of this philosophic tendency in Germany has been to merge the scientific treatment of law in the larger region of general ethical enquiry ; and consequently, instead of the science of law making an even and independent progress of its own, it has undulated with every wave of ethical speculation, and has consequently suffered the retardation incident to the growth of the most involved,

because the most composite, branch of intellectual research.” The writer then censures Bentham because he tested all legal and moral rules by one standard, *viz.*, that of conducing to the greatest happiness of the greatest number, and held that morality differed from law only in the character of the imposing authority and in the cogency of the sanction or penalty. He thus merged the science of law into the science of general ethics and annihilated morality as a region permanently independent of law. On the other hand he eulogises Austin for delivering law from the dead body of morality that still clung to it, and because he “claimed for the region of law a scientific character wholly peculiar and distinct.”(a)

When we come to speak of relevancy we shall give reasons of a metaphysical nature for holding that you cannot abstract law or anything else from its surroundings in the complete manner here aimed at without losing your grasp of the truth. Suppose, however, that it can be done and that the lawyers have achieved the isolation they desire, what will they have gained? They have attained to a science using rigid and exact terms with a restricted meaning always the same as employed in a Court of Justice. But inasmuch as it is abstracted from its surroundings what will they do with it? It is from those very surroundings that come the questions which they have to decide, the persons whom they have to judge and whose suits they have to determine, and all the other business of the law courts. Will any of these people understand or use their terms? We think not and the lawyers allow it. In addition to what he has already said, Prof. Amos admits:—“Nevertheless law, depending, as it needs must, for its execution upon the co-operation of a number of persons, all speaking the language and replete with the sentiments of the current morality, cannot prevent a quasi-moral interpretation being constantly put upon the terms it is trying to rescue from a lax and uncertain use.”(b) Or again, will men accept with satisfaction decisions founded on different ideas of morality from their own, or consider that justice has been done when they have been aggrieved and find that the law courts provide no remedy? Yet surely this must often be the result of such a legal system. What is the use of a mummy science

---

(a) Sheldon Amos, O. C., pp. 4-5.

(b) *Ibid.*, p. 248.



when it has to deal with men of real flesh and blood ? This it appears to us the lawyers have not considered. Their first care should have been to make a legal system sufficiently elastic to apply to the various circumstances of real life and so thoroughly in accord with the better moral opinions of the time that its decisions would shock no one. They, on the contrary, appear to have taken as their chief object the creation of a science which they can boast always gives the same decisions and in the same terms, and to consider that it is the business of the community to fit itself in to such a system. Thus Prof. Amos is not disturbed by the fact that the criminal law diverges widely both positively and negatively from the requirements of current moral sentiment, that it erects into public offences a number of acts to which the moralist is wholly indifferent and forbears to take cognizance of a vast number of not dissimilar acts which the moralist regards with the gravest concern.(a)

But we do not think that the public take this view. The majority no doubt do not complain because they, having no cause to enter the law courts, are not fully aware of the injustice perpetrated there. It is rarely, however, that you hear any expression in favour of the law from one who has been forced to litigate or appear in the criminal courts. The popularity of trial by jury is explained by the legal writers themselves as due to the feeling that the estimation of the moral element is more satisfactorily entrusted to ordinary persons without any predisposition to adopt artificial distinctions, and without technical training, than to a Judge whose professional habits of thought might induce him to leave out of account some of the rougher elements of moral judgment which are the basis of action in common life.(b) Again, the same writer remarks on a tendency in some of the most important classes of crime to introduce even, with the connivance of the Judge, a principle of haphazard justice or lynch law, and adds that in the case of seditious or malicious libels, seditious conspiracies and murder, the reluctance of juries to be guided by any definite legal rules, and the tendency of Judges to warp the existing rules so as to cover or exclude the case before them, is a patent and ominous fact.(c) Surely these

---

(a) Sheldon Amos, O. C., p. 257.

(b) *Ibid*, p. 267.

(c) *Ibid*, 270.

are confessions that the public do not like the legal science offered them, and further that lawyers do not dare to enforce its rules.

This indeed the lawyers have shown in a conspicuous way by their endeavours to persuade the public that the law only punishes what is morally wrong by introducing presumptions of moral wickedness, fraud, etc., where none such really exists. This, too, has to be admitted. "Indeed, through the insufficiency of the analytical method in its hands, law must often avail itself of presumptions, throwing the burden of their disproof upon the person accused; and sometimes, under the guidance of a discreet policy, it must raise presumptions of 'wickedness' without any probable foundation in fact, and without any opportunity being allowed the accused of removing them." Prof. Amos thus explains the use of phrases like "malice in fact," "malice in law," "express malice," "implied malice," and the cases in which excessive negligence is said to amount to malice the judicial consequences of neglect being judicially made to be the same as those of actual wickedness.<sup>(a)</sup> The weakness of this method and the injustice it sometimes occasions have been shown at length in our chapters on intention.

8. We have already had occasion in paragraph 4 to mention the refusal of the lawyers to make adequate use of the conclusions of medical science, and, as we shall return to that part of the subject at length in our chapters on Insanity, we shall say nothing further here. But we must refer to the disregard which the law has shown of the researches of the doctors in hypnotism. We imagine the law would not deny that it is a subject with which it may easily be concerned, yet nevertheless it shows no desire to avail itself of what has been learnt. Its attitude seems rather to be to admit the general possibility but profess incredulity in individual cases, and it is not clear to us how it will ever advance beyond this unless it takes some trouble to acquaint itself with what are the signs and indications of the hypnotic state.

Connection with  
medicine.

---

(a) Sheldon Amos, O. C., pp. 243-5.



We are not aware that the law as a whole has yet admitted its connection with psychology, but it has frequently allowed the importance to it of mental states. Thus it is said : “ The subject of this existence of states of mind is one of the most important topics with which judicial enquiries are concerned ; in criminal cases they are the main consideration ; in civil cases they are often highly material, as for instance, where there is a question of fraud, malicious intention, or negligence.”(a) Legal writers on evidence have also referred occasionally in their treatise to psychology by name and to works on mental philosophy, such as Locke’s work on the Human Understanding. Indeed in the second edition of their work Messrs. Ameer Ali and Woodroffe actually cited in a note to their Introduction the names of Reid, Stewart, Butler, Hume, Locke and Abercrombie, which tempted us to believe that they admitted the importance of psychology. We therefore suggested in the first edition of this work that, if they professed to notice it at all, they might include some recognition of more recent psychologists. We are constrained, however, to think that we were mistaken, for, on looking at the latest edition published in 1911, we see that the note in question has vanished, and we can find no trace in the volume of any attention paid to psychology beyond a single reference to a page of Mr. Sully’s work on Illusions. Nor have we come across any reference to modern psychology in any other legal work that we have perused, in spite of the fact that we have specially looked out for such. Our former remark, therefore, that most legal writers are so fast bound by the traditions of the past, that they will not even acquaint themselves with sources of knowledge which have not been consulted by their predecessors appears still to hold good in the field of psychology.

Nor are we alone in this view. Dr. Albert Wilson writes in 1908 :—“ Biology and Psychology are, however, still regarded, especially by the legal profession, as essentially mythical,”(b) and Prof. Munsterberg on several occasions has censured the lawyers for their obstinate refusal to utilise the results of psychological

---

(a) Ameer Ali and Woodroffe, O. C., p. 192.

(b) A. Wilson : Preface to Education, Personality and Crime.

study. He points out that the educator, physician, artist, business world, politician, military officer and minister all admit the utility of psychology. The lawyer alone is obdurate. The lawyer, the judge and the juryman go on thinking that their legal instinct and common sense supply them with all that is needed.(a)

Again, after describing the wonderful recent progress of experimental psychology and the special attention it has paid to just those problems which are involved on the witness stand, in Germany, France and the United States of America, he adds that practical jurisprudence is still unaware of the rich material gathered. The psychologist is still a stranger in the Court room, and the Court would rather listen for whole days to the "science" of the handwriting experts than allow a witness to be examined with regard to his memory and power of perception, his attention and his associations, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology. "It is so much easier everywhere to be satisfied with sharp demarcation lines and to listen only to a yes or no : the man is sane or insane, and if he is sane, he speaks the truth or he lies. The psychologist would upset this satisfaction completely." (b) He gives an idea of the rich material referred to in the following words :—"Further, there is the psycho-legal field where the memory and the perceptions, the suggestibility and the emotions of the witness are to be studied, where the psychological conditions that lead to crime, the means to tap the hidden thoughts of the criminal, the inhibitions for the prevention of crime, the mental effects of punishment and similar causal processes must be determined." (c) Hereafter some examples of Prof. Munsterberg's methods will be given. Apart, however, from this testimony relating specially to experimental psychology, we think it has been demonstrated on more general grounds in our opening chapter that the law, and in particular the Law of Evidence, is closely connected with psychology. It is further shown in many places throughout this work that the law is intimately concerned with various mental states some of which supply one of the elements of almost every crime. It thus seems

---

(a) H. Munsterberg : Psychology and Crime, Introduction, pp. 9-12.

(b) H. Munsterberg, O. C., pp. 45-6.

(c) H. Munsterberg : Psychotherapy, p. 63.



hardly conceivable that law should ignore totally the results of the science which has made these mental states its special study. Yet such is the fact, and, though they cannot be ignorant of the existence of psychology as a science, the lawyers prefer to employ instead the crude presumptions and assumptions relating to mental states which have done duty for centuries, and which rest on no attempt at scientific analysis. So extraordinary is this attitude that we cannot help suspecting that it is due to something more than ignorance : that the lawyers fear that the touch of psychology would destroy the foundations of many ancient and artificial doctrines which they regard as corner stones of their system. If they let in so much light they would have to rebuild their whole house.

9. The next objection to law is its excessive regard for the past and the inaccessibility of the lawyers to

Excessive regard for  
precedents and the  
past.

new ideas. These qualities are in fact a necessary condition of the maintenance of the narrow and artificial legal system already described,

and they are also the natural products of the restricted and specialised type of education adopted. In the previous chapter we adverted to the singularity of law in always looking to the past and the disadvantage to the community of a system which does not attempt to provide for its growing needs was also pointed out. Such considerations, however, do not seem to trouble the lawyers. Sir William Markby says that " English lawyers have always preferred authority to principles ; and they seem to regard principles with something like suspicion." (a) He further admits that nowhere else than in England and in countries which have derived their legal systems from England have the decisions of Judges been systematically treated as authoritative. In Roman law no decisions of any tribunal, as such, had any authority whatever. Nearly all modern continental codes contain similar prohibitions, and this is the modern continental practice. (b) Thus in Germany it is laid down that " the opinions of law professors and the views taken by prior Judges shall not be in any way considered in future deci-

---

(a) Markby, O. C., Preface.

(b) *Ibid*, p. 60.

sions," (a) and Unger says that customary law cannot be applied in Austria because its application is forbidden by legislation.

He admits similarly the aversion of Judges to innovation, and accounts on this ground for the embarrassing nature of the double terms "malice in fact" and "malice in law" "legal or constructive fraud" and actual fraud, "constructive notice" and actual notice, etc. "Anyone acquainted," he says, "with the history of English law, knows exactly how this has occurred. To have said that malice or fraud or notice were not necessary, in cases where they had been generally thought necessary, would have been too much like an avowed innovation. For though it is, as I have shown above, a duty imposed upon English Judges, within certain limits, to make new laws, it is against the tradition of their office ever to avow it. By saying, therefore, that there is malice in law, or fraud in law, they pretend that there is malice or fraud or whatever else they think unnecessary, when there really is none at all." (b) We are afraid that we can hardly share his satisfaction with the practice or the spirit which is said to inspire it.

Prof. Dicey has much to say on the subject of precedents and judge-made law. He also states that the idea that the Courts must follow precedents has obtained more complete acceptance in England than in any continental state. (c) He explains that "it is a Judge's business to determine not what may be fair as between *A* and *X* in a given case, but what according to some definite principle of law are the respective rights of *A* and *X*." These principles are the precedents which the Judge must follow, by which expression is meant that a Court having once decided a particular case on a given principle, must decide all really similar cases in accordance with the same principle, or, in other words, a Court is bound by its own judgments. These judgments may be overruled by a Higher Court, but when we come to the House of Lords, that Court is bound by its own judgments and cannot alter its view. When it is recognised that a ruling is mistaken or unsuitable, the only way out of this *impasse* is for the Legislature to declare that the ruling in question is no longer law. It would appear to be ob-

---

(a) *Allgem Landrecht* : Introduction, s. 6.

(b) Markby, *O. C.*, p. 336.

(c) Dicey : *Law and Opinion in England*, pp. 481, sq.



vious from this that inconvenience must result and the law must frequently be much behind the times, for Parliament has no leisure to be correcting constantly the mistakes and anomalies of the Courts' decisions. This appears to be admitted and somewhat inadequately excused in the following passage:—"But it has of course often happened that the ideas entertained by the Judges have fallen below the highest and most enlightened public opinion of a particular time. The Courts struggled desperately to maintain the law against regrating and forestalling when they were condemned by economists and all but abolished by Parliament. It is at least arguable that the Courts restricted within too narrow limits the operation as regards wagers of the Gaming Act, 1845, and missed an opportunity of freeing our tribunals altogether from the necessity of dealing at all with wagering contracts. There are certainly judicious lawyers who have thought that, if the Common Law Courts had given more complete effect to certain provisions of the Common Law Procedure Act, 1854, part of the reforms introduced by the Judicature Act, 1873, might have been anticipated by nearly twenty years. However this may be, we may at any rate as regards the nineteenth century, lay it down as a rule that judge-made law has, owing to the training and age of our Judges, tended at any given moment to represent the convictions of an earlier era than the ideas represented by parliamentary legislation. If a Statute, as already stated, is apt to reproduce the public opinion not so much of to-day as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday. But with this statement must be coupled the reflection, that beliefs are not necessarily erroneous because they are out of date; there are such things as ancient truths as well as ancient prejudices." (a)

We doubt the validity of this defence: ancient truths only remain true because they are not out of date, in the sense that they are still of use. That out of date beliefs can be of any utility to the community is difficult to see; nor do we think it the business of judges to impose on the people notions taken from the past which they regard as correct without reference to the opinions and wishes of the day which are intended to be expressed by the legislature.

---

(a) Dicey: *Law and Opinion in England*, pp. 364, sq.

The assumption of such a right is in our view a serious drawback to judge-made law, as it is admitted, by this same writer, that the idea of expediency or policy accepted by the Courts may differ considerably from the ideas, which at a given time, having acquired predominant influence among the general public, guide parliamentary legislation.

There is a still more specific defence of the practice of strict adherence to precedents made by Prof. Dicey as follows :—"Judicial legislation aims rather at securing the certainty than at amending the deficiencies of law. The natural tendency of a well-trained Judge is to feel that a rule which is certain and fixed, even though it be not the best conceivable, promotes justice more than good laws which are liable to change or modification. This is the true and valid defence for reverence for precedent." He then admits that there are instances enough where a decision of very dubious soundness has been systematically followed, and has led to a misdevelopment of the law, but quotes in answer a dictum of Parke, J., (a) to the effect that the judges must apply rules of law taken from legal principles and judicial precedents to new combinations of circumstances, and that for the sake of attaining uniformity, consistency and certainty they must apply them, where they are not plainly unreasonable and inconvenient, to all cases which arise. Further, they are not at liberty to reject them because they are not as convenient and reasonable as others which could be devised both for the above reason and also in the interests of law as a science. To this Prof. Dicey adds that, if the Courts were to apply one principle today and another tomorrow to cases substantially the same, men would lose rights which they already possessed ; a law which was not certain would in reality be no law at all. Elsewhere he defends the judges from the criticism that it is the business of the Courts to decide cases and not to make law on the ground that the system may be bad, but the judges cannot be blamed for it, as they are only acting in accordance with the system they are appointed to administer. Prof. Dicey is supported in these views by Sir Frederick Pollock. Referring in a note to "modern usage as to co-ordinate authority," he says, "cf. Vaughan 383, where

---

(a) *Mirehouse v. Rennell* (1833), 1 Cl. and F., pp. 527, 546.



the language is wide, if Vaughan, C. J., really said that a Judge can never be bound to follow an authority with which he personally does not agree, he disregarded the uniform practice of English Courts." He then expresses the opinion that where a decision, or series of decisions to the same effect, has been accepted for law and acted upon by many persons and become a guide to lawyers and their clients in their dealings with property, even Courts of Appeal are slow to interfere, and such a rule may perhaps be upheld, although modern research has shown that it was originally founded on a mistake. To reverse it might well produce more inconvenience than advantage. Even an erroneous construction of a Statute may stand unrevised, if it has become, on the plausible authority of a series of decisions, a law which men follow in their daily dealings. He instances the conduct of the Court of Appeal in England which not merely considers itself bound by its own decisions, but also by those of Courts of like authority, namely, the Exchequer Chamber and the Court of Appeal in Chancery which existed before it : the House of Lords which considers itself absolutely bound by its own former decisions ; the Court of Crown Cases Reserved which has followed a previous decision of the same court, though some at least of the Judges present were not satisfied with that decision, on the express ground that it was binding. On the other hand the American Supreme Court of the United States and the American State Courts do not hold themselves bound by their own former decisions.(a)

We do not assert that, if this ideal of certainty and uniformity were attainable, there might not be something to be said for this method by which it is sought to attain them. A metaphysical study of the nature of life and experience has, however, convinced us that cases are not similar in the sense required for the application of such a method. It is only by omitting to consider just those individual differences of conduct and circumstances which cause them to vary, the purpose, the aim and all the subjective conditions which are of the essence of the occurrence, which make them of value and worth to the individual and connect them with life, that the Judges can even attempt to apply the rules which they so much revere. This view of the matter will be explained further

---

(a) Pollock : A First Book of Jurisprudence, pp. 305-9 and 319.

in our remarks on relevancy in paragraph 11. What it seems to us the Judges actually do is to neglect all the above and look merely to the effect of actions, concerning themselves solely with the objective conditions. They trace a similarity where they can find like results in some past case similarly carved out of its proper surroundings. By means of all these abstractions they force the new case under their old precedent ; but the abstractions have in fact taken the real meaning out of the case, and all that they apply is an outline decision to a skeleton remainder. The formal adjudication which results gives no satisfaction to the parties, who feel that their case has not been decided according to its merits but by the application of an artificial rule taken from other cases whose circumstances did not really correspond to theirs.

It seems to us that if a sense of injustice remains that in itself is sufficient to condemn this system. But there are some we believe who admit that under this system hardship is often suffered, but excuse it on the ground that the law can only deal with human affairs in a rough and ready way and cannot frame rules to meet every contingency. This they would say is the justification of the abstraction we have condemned. We, too, agree that the law cannot make such rules ; as already said, it attempts to provide for too much by rule and the precedents we have been discussing are such rules. The remedy is to allow the judge more latitude and teach him to be more equitable ; he may consult past decisions but not be bound by them. In whatever other science or walk of life do people consider themselves bound to abide indefinitely by a former opinion ?

10. Further, that the law, with the aid of its omissions and abstractions, does not in fact attain to certainty and uniformity to any real extent, seems to us shown by the following considerations. The uncertainty of the result of going to law is a byword, and it is well known that respectable solicitors far more frequently advise their clients to compromise and avoid the law courts than to go into them. Again, it is no uncommon thing for the solicitor to be unable to advise at all ; he has to resort to counsel's opinion, and, when that is obtained, it is often so undecided on the mere question of law, that it is impossible to take any action with confidence on

The law as it is fails to attain certainty.



it. If a second counsel's opinion is taken, he is as likely to be in disagreement with the first opinion as in agreement with it, and when the case is tried, the Judge sometimes decides it on some ground which has not been even considered by either counsel. It is notorious that when a will is disputed almost anything may happen.

Then, again, there is no limit to appeals, and, so uncertain do the parties often feel as to the result of the appeal, that they compromise in the interval. The fact that appeals are so numerous and so frequently successful is in itself an eloquent comment on the uncertainty of the law: the further fact that after losing in the first Appellate Court, so many persons are willing to incur the heavy expense of a second appeal, shows that there is a good chance of upsetting a decision which has been already once confirmed. Similar uncertainty is revealed by the manner in which the Judges on a bench disagree among themselves. Prof. Dicey himself says: "The uncertainty of the law may be seen in the disagreement of eminent Judges" instancing the case of *Derry v. Peak*.<sup>(a)</sup> Sir William Markby writes:—"Were the law ideally complete, every command with its appropriate sanction would be expressed clearly and fully by the sovereign authority. But this not having been done, a great deal of the time of the lawyers and Judges is occupied in the endeavour to arrange and interpret obscure and conflicting rules, and to make these rules wide enough to cover the cases which have arisen. We are perpetually in search of some clear and authoritative expression of the law, which expression we very rarely find."<sup>(b)</sup> This he admits is a reproach to the lawyers, but consoles himself with the reflection that laymen could not have done the work even as well. He attributes their failure to the fact that the lawyers have not pursued their special studies closely enough. He denounces the layman for criticising the lawyer's work and preferring the advantages of an appeal to common sense, which he terms an appeal from knowledge to ignorance. The layman's knowledge on legal subjects, he says, is at zero, and if the law is bad it must be made better by skilled persons and not by unskilled.

---

(a) 14 App. Cas. 337.

(b) Markby, O. C., pp. 106-7.

We presume that there is some reason for this tirade against the layman : at all events it indicates that the dissatisfaction of some layman has led him to criticise the present state of the law, and this suggests that the law has not been altogether successful in its results. His own advice amounts to saying that the law should be made still more special, that is to say, more technical and artificial in its language. But if the layman's knowledge of it is already at zero, when it has been amended as proposed, his knowledge will apparently be some degrees below zero. Surely the lawyers would have nothing to be proud of when they have achieved the work of making the law of the land completely unintelligible to the ordinary man. The writer does not seem to perceive that the layman does not claim to know the law : he has long since given up that hope. But what he does understand by his own experience of it and what disgusts him, is the uncertainty of the results of the law. This and the injustice so often perpetrated in the law courts are what cause him to criticise the lawyer. He feels that there is something wrong about the lawyer's ideal, and so long as it remains what it is, he will never make the law any better.

We do not think that the law is likely to reform itself for several reasons. The particular specialised education which the law affects has resulted in the rigid fixing and grouping of its ideas in one definite order, which amounts to a habit, and is with difficulty altered. The changing character of our environment and our needs demand ever new kinds of response, but the procedure of the law being fixed in excess of the uniformity of outward circumstances gives no such response.(a)

The lawyers have become fast bound in the customs of the law and the breaking of the bonds of custom is the condition of progress. An individual must not be bound in absolute obedience to any system of rules prescribed by custom or in any other manner, if he is to progress. For he has no occasion for reflection on conduct, no scope for the free exercise of judgment and choice, no opportunity for acquiring by absorption the traditional system of social sentiments.

---

(a) Cf. J. Sully : *The Human Mind*, Vol. I, p. 201, and Vol. II, p. 232.



For his own conduct he has merely to ascertain what behaviour the legal custom prescribes for each situation and to observe its prescription ; and as regards the conduct of others also there is no scope for judgment but only for the ascertainment of fact, did he, or did he not, neglect the observance ? If he did, he must be punished : if not, he is to go free.(a)

Further it is only natural that the law should not progress or be reformed by lawyers as, owing to its unique position, there is no stimulus thereto. The end of its labours arouses no curiosity among its profession, who have no way of knowing whether it has been successful or not. Although part of its task is to acquit or convict accused persons, it practically never knows whether its decision has been right or wrong. When the man is liberated in court or is sent to jail, he is not heard of by the law again, and the lawyer makes no further enquiries into his case. So with civil law, when the last decision has been given, it never knows whether justice or equity has been done : it cannot really say whether it has been successful or not. Now in the sciences, *e.g.*, Medicine, Physics, etc., or in the Church, the workers do observe the results and know whether they have failed or succeeded, and if they have failed, they ask why, and experiment afresh and try something new.

The only way in which the lawyers could get some idea as to their success or failure, is by listening to the criticism of others, *i.e.*, of Society which feels though indirectly the bad effects of miscarriages and failures of justice and inequitable decisions regarding property, contracts, etc. It is in fact the layman whom they should ask what steps they should take to obtain better success. But we have just seen that this is exactly what they will not do. Their method, as exemplified above by Sir William Markby, is to resent the layman's criticism and think it sufficient to retort that he knows no law. According to their criterion their work is successful if they have satisfied the rules of law, and it is not their business to concern themselves with what may be the effect of their decisions on society.

---

(a) Cf. W. McDougall: An Introduction to Social Psychology, pp. 220-1.

We fear, then, that we must look away from the lawyer for a remedy, and that it must lie in the direction of less law and more latitude allowed to the Judge. But the Judge must also be one who will not fail to take advantage of such latitude, and this means the possession of certain qualities and a different training from that now given. The existing ideal of a Judge appears to be that of a kind of abstract man, in whom all emotion is wanting and only intellect remains. Further, this intellect rests mainly on a knowledge of the text-books and precedents of the law, and the power of drawing acute and fine distinctions which will serve to restrict the view to the narrow limits of such learning, prevent the mind straying into the broad paths of experience of life, and so attain certainty and uniformity in the law. This intellect is necessarily of an over-cautious type as it is bound down by rules which it must always be on the look out not to transgress, and the compliance with which is for it the necessary condition of the existence of law as a Science : it is further divorced from emotion, which is the source of confidence, and utilises whatever it finds ready to hand. This over-cautiousness is often intensified in England by the excessive age of the Judge and his consequent well-known tendency to distrust new ideas and look only to the past for guidance. Lastly, this despising of emotion, reliance on intellect and ideal of uniformity and certainty, and the building up of a science of law, leads the Judge to be satisfied if his decisions comply with abstract rules and an artificial procedure, and to be indifferent to the effect of his decisions on the litigants.

We venture to uphold the view that the first object of the law should be to promote justice : the chief qualification for this on the part of the Judge is the ability to enter into the feelings and thoughts of those who come before him. The real meaning of life lies in the part which purpose or individualism plays in it, and the emotion which enters into it. Interest and passion obtain throughout and cannot be neglected. These can only be grasped by imagination without which a Judge cannot get at the truth of facts. Well do we know the case of the rustic witness who denies he knows anything for fear he may be brought to court and in-



volved in trouble, but afterwards admits that he saw the whole occurrence. He as often as not is disbelieved by the Judge, who has not sufficient imagination to put himself in the place of this Burman agriculturist and finds it safer to discredit him on the ground that he has contradicted himself. The Judge who eviscerates all his emotions and applies strict rules of evidence to exclude much information which bears on the case may arrive at impartial decisions, but they are empty ones and often mistaken. We do not want then a Judge without feeling, but one who will enter into individual circumstances and consider them, and will not trust to general rules and award punishment according to normal scales. We do not want one who thinks he must put on a special judicial attitude when he goes on the bench and cast off all his humanity and ordinary ideas of life.

We must in the first place have more idealism and less scepticism and cheap utilitarianism. It must be recognised that a thing is valuable in law because it is just, because it means a realization of the ideal of justice, and not because it contributes to a science or complies with adopted rules and procedure, and so wins the approval of the legal fraternity and secures their happiness. No result can be regarded as satisfactory when it is felt that the law has been followed, but justice has been denied. To avoid this an independence is required which will enable the judge to resist the importunities of advocates to extend the sphere of restrictions laid down by law and a readiness to avail himself of more possible sources of knowledge. Other judges may have thought them unsafe, because they were unable to handle them, but that is no reason why he should discard them. Individuality in a judge should not, as at present, be regarded as a fault nor should it be a crime for him to think in any but one accepted way. We want a mind in which the voluntary attention is strong and which is not merely passively attracted to what is brought to its notice: it must turn actively to what is important and significant and valuable in itself. The judge must therefore be open to suggestion, though not to an excessive extent, and must prefer to run some risks and act on probabilities in order to arrive at a positive result of value, rather than profess scepticism and be content with a formal and negative conclusion which is virtually equivalent to a denial of justice.

11. In this section we challenge the basis on which the law has framed its rules of evidence and procedure.

The rules of law founded on a wrong view of life and experience.

Our grounds of objections proceed from a metaphysical consideration of the nature of human experience, life and reality. It is admitted that "it is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them." (a) This certainly implies that it is necessary to have some knowledge of the nature of life.

The error of law consists in this: it assumes that to make things clear you must separate, and that you cannot deal with wholes but only with what you can admit after employing fixed rules for rejecting the balance. When you have made your rejections and obtained what is relevant you can then reach the truth by reasoning deductively from the separate pieces of evidence which you have divided off and carved out of the whole. Further, that you can infer from one step to another in virtue of objective conditions which constitute the necessary connections among these isolated pieces of evidence, and these objective conditions the law has attempted to lay down in its rules of evidence. Now we do not deny that it is necessary to select out of wholes what is relevant and not to attempt to deal with unmanageable masses, and that for this purpose some rejection is imperative. But it appears to us that the lawyers have over-applied this notion of making things clear by separation, and, owing to their failure to recognise that human experience is not cut up into bits but consists of a continuous flux in which all the parts interpenetrate and overflow, they have attempted to separate much that is in fact inseparable from the parts they have rejected. Nor in many cases have they realised that by separating from its surroundings you may alter entirely the meaning of a thing because they have not grasped what it is that gives meaning to events. Lastly, that the real way of finding the truth is rather to grasp it as a whole by intuition than to reach it deductively by arguing down from part to part, and that some

---

(a) Campbell, C. J., in *Humfrey v. Dale*, W. R. (Eng.), 1856-7, p. 467.



of the tasks in the way of separation and rejection of the material presented are not merely grossly artificial in method, but even intellectually impossible, because the connection is partly in the mind of the person considering it and not in objective conditions attaching to the events themselves.

We believe that the most recent and the most correct view of the nature of life and experience is that given by M. Henri Bergson. He explains that reality is a perpetual becoming, a continuous flux, out of which the intellect, whose function is essentially practical plucks those moments that interest us. When we conceptualize, we cut out and fix and exclude everything but what we have fixed, but in the real sensible concrete flux of life all life experiences penetrate each other so that you cannot know just what is excluded and what is not. The intellect attempts to substitute static cuts for units of experienced duration, but in real life there are no such clean cuts. These attempts lead to paradoxical results, as in Zeno's well-known fallacy of Achilles and the Tortoise, which are due to applying conceptions devised by thought to situations to which they are really inapplicable. Reality is not to be reached by any elaborate construction of thought ; it is to be given in immediate experience, as a flux, to be grasped by intuition as a whole, not in parts or divided into parts. There is in truth never separation, but preferential attention, for even in analysis the continuum remains undivided and whole.(a)

Now the law is just such an intellectual construction made for a practical purpose : it makes cuts in experience by its exclusions and rejections of evidence, and its divisions often do not correspond sufficiently to the reality of life, inasmuch as it attempts to force the judge to separate off in his mind where no separation is really possible when one occurrence leads on irresistibly to another. Not merely is this so because of the necessary connection believed to exist between some events, but because the judge is himself considering everything that comes before him with reference to a purpose. All that is valuable to him for that purpose is relevant and to at-

---

(a) H. Bergson : *Creative Evolution*, Translation, A. Mitchell, pp. 261 sqq., 282 sq., and *passim*.

W. James : *A Pluralistic Universe*. Lectures VI, VII and VIII.

E. D. Fawcett : *Matter and Memory*, Mind, N. S. 82, p. 202.

tempt to prevent him using it by making it inadmissible under a rule of evidence is simply to hinder him in finding out the truth and to betray an ignorance of what is the true meaning and test of relevancy. Indeed what is relevant for one judge may easily be irrelevant to another, or what is relevant at one stage of a case may become irrelevant later, if the purpose of the moment happens to change. Hence there can never be any formal test or guarantee of relevance, and the attempt of the law to make any such is doomed to failure.(a)

We shall now attempt to make this clearer by illustrations.

#### Relevancy.

The definition of "relevant" in the Indian Evidence Act, section 3, is as follows:—  
 "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts." There then follow a number of sections which state what facts and statements are relevant, all of which assume that the relevancy lies entirely in the fact or statement itself, and is shown by its objective connection with some other fact. As a matter of fact one of these sections, if properly understood, does not assume this, *viz.*, Section 11 (2), according to which "facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable." This section, however, as explained in paragraph 5 above, has called forth a protest from the lawyers, who attempt to cut down its meaning and render it nugatory. The real reason of this lies in the nature of probability which is a subjective matter as shown below in Chapter IX(b) and the legal writers dimly perceive that the free use of this section would be inconsistent with their view of the nature of relevance. The same is true, though not so obviously, of section 6, according to which "facts which, though not in issue are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time or place or at different times and places." The lawyers have not pro-

---

(a) See Article Relevance F. C. S. Schiller, *Mind*, N. S. 82, pp. 153, sqq.

(b) See pp. 328-30.



tested here because they think that sameness or identity is an objective condition inherent in the facts themselves. We have, however, pointed out in our Chapter on Identity(a) that this is not so, and that the test is really a subjective one, and that those events are to be regarded as forming part of the same transaction which the Magistrate finds convenient to treat as such for the purpose which he has in mind.

It is somewhat significant that the lawyers should have involuntarily admitted into their rules of evidence these two sections, which are really based on the test of relevancy for which we contend. Still more significant, however, are their attempts to define relevancy outside the Act itself. Sir James Stephen at first defined it to be the connection of events as cause and effect(b); but subsequently, on the ground that this theory "was expressed too widely in certain parts and not widely enough in others," he substituted a definition according to which "the word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other." (c) The point of this definition lies in the introduction of the word "probable," which makes it a subjective matter and really leaves it to the judge to decide for himself what is relevant, though, unless we are mistaken, the lawyers have never clearly realised this. It is objected to, however, by Messrs. Ameer Ali and Woodroffe that "this is 'relevancy' in a *logical* sense. Legal relevancy which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and for reasons of particular convenience, demands a *close* connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant—that is absolutely essential. The fact however that it is logically relevant does not insure *admissibility*; it must also be legally relevant." (d) The italics are those of the editors,

---

(a) See pp. 476-7.

(b) Stephen: Introduction to the Indian Evidence Act, 68.

(c) Stephen: Digest, Art. I.

(d) Ameer Ali and Woodroffe, O. C., p. 123.

and the passage is really remarkable, for we doubt whether anyone would search for logic in the facts themselves and not in the mind of the reasoner : it is also an admission that the rules of evidence deliberately exclude some evidence logically relevant. Still more instructive, however, was a pamphlet on the subject written by Mr. G. C. Whitworth. He attacked Sir James Stephen's definition on grounds with which we are not here concerned, and proposed instead four rules of which the first and chief one ran as follows :—“ Rule I—No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.” Now if Mr. Whitworth had also recognised that likelihood and unlikelihood, which are the same as probability and improbability, are simply a subjective matter to be decided by the judge, the effect of his rule would have been to leave everything to him. But this rule did not stand alone, and we infer that Mr. Whitworth intended to confine relevant facts to the four classes of facts stated in rules II and III, and IV, subject to the provisions of Rule I. In rules II, III and IV he relies practically on the causal test.(a)

Again, Prof. Thayer criticised the Act as an over-ingenious attempt to put the rules of evidence wholly into terms of relevancy, and referred with approval to the English law which furnished no test of relevancy. According to him under that law, unless excluded by some rule or principle of law, all that is logically probative is admissible. The judge simply has to ask himself, Does testimony of this fact help me to determine the issue I have to decide? Whether it does or not his reason and experience will tell him. If it does not, then the rule of reason excludes it.(b) This no doubt sounds promising, but it is just these exclusions by some rule or principle of law that do all the damage and occasion the interminable arguments about admissibility and prevent the judge having a free hand. We cite the passage to show that some legal writers are doubtful about the test of relevancy employed in the Act, and see that what is useful to the judge is the real nature of the test.

---

(a) Ameer Ali and Woodroffe, O. C., pp. 85-6.

(b) *Ib.*, pp. 95-6.



12. Referring to Section 7 of the Evidence Act, Messrs. Ameer

Illustrations of  
rejections, exclu-  
sions and restric-  
tions resulting from  
such a view.

Ali and Woodroffe quote the case of similar but unconnected facts and say that generally speaking it is not admissible to prove the fact in issue by showing that facts similar to it, but not part of the same transaction, have occurred on other occasions. They explain that the events must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn.(a) Now it is quite clear that the evidence of the occurrence of similar facts on other occasions may be decidedly valuable, but it is probability and not causality which is here the ground of their admission. Similar events are really relevant as tending to make the event in question more probable because they are evidence of the uniformity of nature. It is a case really of induction by simple enumeration which can never give causality: but the larger the number of instances enumerated the greater becomes the probability to the mind of the enquirer of the uniformity alleged or assumed. If, however, causality has to be shown on each occasion much useful evidence will be excluded, and we think that examples are given of this in illustrations (n), (o) and (p) to section 14. The first says: “*A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.....The fact that *B* was habitually negligent about the carriages which he let to hire is irrelevant.” Surely such a fact if proved would undoubtedly render it probable that *B* was negligent on this occasion, and it ought not to be ruled out as inadmissible. For it cannot be admitted under section 11(2) according to the interpretation put on that section by the lawyers, as explained in paragraph 5, and we know of no other section under which it can be admitted. The same seems to apply to illustrations (o) and (p); “(o) *A* is tried for the murder of *B* by intentionally shooting him dead.....The fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant.” “(p) *A* is tried for a crime.....The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.”

---

(a) Ameer Ali and Woodroffe, O. C., pp. 135-6.

We have pointed out in our chapter on causation how sometimes in order to avoid such a result the commentators explain by a causal connection where none such really exists. (a)

An illustration of an attempt to omit facts where no such omission is really possible is Section 9, illustration (b). The section says that facts necessary to explain or introduce a fact in issue or relevant fact or which support or rebut an inference suggested by a fact in issue or relevant fact.....or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose; illustration (b) “*A* sues *B* for a libel imputing disgraceful conduct to *A*; *B* affirms that the matter alleged to be libellous is true. The position and relation of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue. The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.” But how, we would ask, can you ascertain whether the relations were affected or not without learning the whole particulars of the dispute? “A dispute” conveys nothing: it is the particulars which give it its meaning and cause it to have a result or not. This you must know if you are to find out the real terms on which the parties were and grasp their position as a whole. Section 8 allows the conduct of a party to be proved if it influences or is influenced by any fact in issue or relevant fact, and adds that the word “conduct” does not include statements, unless those statements accompany and explain acts other than statements. It seems to us hardly possible that such restrictions can be maintained successfully: what is required is a simple permission to prove the whole conduct of a party without attempting to define that term and separate up the constituents.

Under sections 26 and 27 no confession made by a person in the custody of a police-officer can be proved against the person making it. Provided that when a fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such informa-

---

(a) See p. 280.



tion, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. To one who is not acquainted with the rulings it is hardly credible what distinctions have been drawn and what attempts have been made to divide up whole transactions into separable parts on the strength of the words "discovered," "in consequence," "so much of such information," and "relates distinctly." Surely in such a case the only reasonable way is to prove the whole confession as well as the discovery and leave it to the judge to decide what weight he will assign to the confession in his disposal of the case. By excluding portions of such occurrences you are likely to render the whole misleading or unintelligible; this danger is admitted by the commentators. (a)

Under section 30, "when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons as well as against the person who makes such confession." Now under section 239 of the Criminal Procedure Code persons accused of different offences committed in the same transaction, may be tried together, and it happens not infrequently that one accused confesses and in his confession implicates the other, as they have both been engaged in the same transaction. Yet under the rule of the Evidence Act quoted, as the two men are not being tried for the same offence, the judge may not consider the confession of the one against the other. To abstain from doing so in such a case is, we believe, often practically impossible. The judge has heard what has been said and cannot dismiss it from his mind, and in his attempt to find out the truth it contributes its influence towards convincing him that the accused, who has not confessed, is guilty. Perhaps by its aid he has grasped the truth, and is then placed by this restriction in the maddening position of being unable to say so: he may instead in his judgment have to affect to believe that the case against the accused is not proved for want of sufficient evidence, when all the time he feels that there is really no doubt whatever. All this arises from framing the rules of evidence on the

---

(a) Ameer Ali and Woodroffe, p. 132.

assumption that because parts of a transaction can be separated off in description from one another a similar separation can be made in the effect of all the evidence on the mind. Whereas, as we have said, the truth is grasped as a whole by intuition and not by deductive steps in parts corresponding each to so much of the evidence given. That the task imposed on the judge is an intellectual impossibility is indicated by some opinions of judges on the subject of separating regular from irregular evidence. One said :—" In this case I have found myself upon two different occasions where it has come before me in that difficulty in which a judge will always bring himself when his curiosity or some better motive disposes him to know more of a cause than judicially he ought." The other :—" I shall decline to look at what is not regularly in evidence before the Court. The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy. I purposely abstain in all these cases from looking at the proceedings, for my mind is so constituted that I cannot, in forming my judgment on any matter before me, separate the regular from the irregular evidence." (a) The meaning of such utterances really is that the judges are deprived of valuable aid to the truth owing to the narrow and artificial rules of evidence. If it were left to them to treat as relevant what they have found helpful for their purpose no such difficulties would arise. We may point out that Appellate Courts must also often be put unavoidably in the same position as these judges when, after reading through the record of the Lower Court, they decide that some of the evidence was wrongly admitted. Section 167 of the Evidence Act provides that there shall be no new trial on account of improper admission or rejection of evidence if, apart from such, the decision was justified, and this, no doubt, assumes that the effect of the evidence as a whole can be separated into parts. Yet it was on a similar point that the Privy Council gave a contrary opinion in the case of *Subramania Ayyar v. Rex*, (b) when they decided that the effect of an illegal misjoinder of charges could not be cured under section 537 of the Criminal Procedure Code by dissecting the verdict afterwards, and appropriating the finding of guilty only to such parts of the charge as ought to have been submitted to the jury.

---

(a) *Ameer Ali and Woodroffe*, p. 115.

(b) 25 *Mad.* 61, 96, 97 (1901).



The rules relative to joinder of charges, and particularly the one which allows the joint trial of offences committed in the same transaction, have been and always will be a source of trouble and confusion. The reason is that, as interpreted in law, they contain restrictions which are inconsistent with the nature of real life, the transactions of which run over and intermix and cannot be kept apart by rules as attempted here. The human mind recognises this and treats what comes to it naturally as the same transaction ; it takes together what it finds connected in one whole and overlooks or is impatient of such artificial rules the application of which often means for it a vain struggle against the facts. We are convinced that these rules produce an amount of inconvenience and irritation out of all proportion to any good they may do.

Lastly, we shall refer to the question of corroboration. A special importance has been given to this with respect to the credibility of accomplice evidence and confessions. All that the law (Evidence Act, Section 133) says is, that an accomplice is a competent witness against an accused, and that a conviction which is based on the uncorroborated testimony of an accomplice is not illegal. As regards confessions it merely states what an admission is (Section 17), and that it may be proved against the person making it (Section 21), unless it has been made under certain circumstances. The Courts, however, by their glosses have created a kind of supplementary law on the subject by laying down hard and fast rules as to what does and what does not constitute sufficient corroboration with reference to accomplice evidence and confessions. As many of these rules are stated in Appendix I., it is unnecessary to do more than give two examples here, *viz.*, that confessions made by one of several prisoners who are being tried jointly for the same offence are not corroboration of the sworn evidence of an accomplice, and that the evidence of one accomplice is no corroboration of that of another. Personally we regard all these dicta as worthless, if looked to for assistance, and often as hindrances to judges about to do right on their own initiative. The reason is that they are all founded on a wrong idea of what corroboration is. For the Courts seem to imagine that there is such a thing as corroboration in general, something which has a kind of objective existence concerning which fixed rules may be laid down. It is the same error

as they make with reference to relevancy to which corroboration is closely related. Corroboration is not what strengthens anything *per se*, but what strengthens it to an individual mind ; that which when added to something else tends to convince a person enquiring with a purpose. What is corroboration in some circumstances is not in others, and what is corroboration to one mind is not to another. It all depends on the general circumstances of the case ; the reasons to suppose that something more or nothing more should be forthcoming in the way of evidence, the particular circumstances which have already impressed the judge, the extent to which they have done so and so forth. But these rules of evidence can take no account of such things : without reference to what may be relevant for a particular judge in a particular case, they exclude blindly, and thus sometimes leave him in the irritating position of seeing within his reach something of great assistance to him to complete his conviction but which he is told he should not use. Or, if he does make use of it, he frequently finds that the Appellate Court having never grasped the case as a whole in the same manner as the judge who tried it, sees no force in the circumstances on which he has laid stress as a corroboration and treats it as of no value on the strength of one of these dicta.

13. In almost each of the preceding sections indications of the ill-success of the law have been incidentally given and many more are forthcoming in the succeeding chapters. But it is necessary to add a few observations here and to quote some opinions in addition to those in the general introduction. In the first place, it is hardly conceivable that a law should give satisfaction which, as we have already shown, is quite unintelligible to the ordinary man. The effect it produces is well given in a recent leading article of the "Spectator" of February 24th, 1912 :—" Men are very apt when a question of the law is raised to suffer a kind of intellectual despair, as if they were confronted with an unknown thing—something mysterious and therefore terrible." If they cannot understand it men do however realise its results many of which are condemned as unjust by the community. It could hardly be otherwise, so far as the criminal law is concerned, as it is admitted that the law has to describe its crimes in the popular language and base them largely

Evidence of the ill-success of the law.



on the popular ideas of morality. Yet it is at the same time said that the lawyers take dangerousness and not wickedness as their test of crime, and that they cannot make wickedness the basis of judicial decisions. It is further allowed that as the result of this the law lets go unpunished offences which the community reprobates, as *e.g.*, seduction, and makes criminal others which the community does not regard as crimes. The legal use of "malice" neglect and fraud and its practice of putting the burden of proof freely on the accused by means of presumptions illustrate the latter class.(a) As the outcome of this we have the petitions on behalf of condemned malefactors widely signed, and the attempts of judges to strain and evade the law already alluded to. These are outward signs but there must also be less visible results. By a bad administration of law causing injustice emotions are strangled and work mischief: secret feelings and stored up emotions are known to be dangerous and create the most desperate type of criminal.

The lawyers' treatment of insanity in criminal cases is widely condemned by the medical profession, and its unsatisfactory nature is shown in our Chapters on the subject. We shall here quote a few figures to show how recklessly insanes, epileptics and the weak-minded are sent to prison as ordinary criminals. According to the official report of Parkhurst Prison for the year 1909-10, during that year thirty-five convicts were certified as insane and sent to asylums. In 1910-11 in Liverpool Prison there were 92 epileptics, in Wakefield 53, and in Parkhurst 10, or 155 in three prisons in one year. In 1908-09, out of 142 weak-minded prisoners confined at Parkhurst only two could be held responsible for their lamentable state, their weak-minded condition being attributed to over-indulgence in alcohol.(b)

We further hear bitter complaints of the delays of the law. In the "Standard" of September 25th, 1911, is reported a severe indictment by President Taft of the American Courts, in which he asserted that the Americans' distrust of the Judges was fully justified, and that the law's delays constituted unquestionably one of the great causes of the present national unrest. He referred to the

---

(a) Sheldon Amos, O. C., pp. 236—245, 257 and paras. 3 and 7 *ante*.

(b) T. Holmes: Psychology and Crime, pp. 18, 19 and 48.

number of homicides allowed to go unpunished, and urged the impeachment of some judges. He stated that the Courts had not fulfilled their functions and had not shown themselves adaptable to the punishment of crime, and he gave as the chief cause of the unsatisfactory state of affairs that the American Judges permitted procedure to slip from their hands and allowed the lawyers to take the court-rooms under their control. It is the opinion of some in India that much of the unrest there is due to the use of the High Courts by seditious agitators as a tribunal in which to challenge and delay the executive acts of the district officials and the willingness of the judges to suspend the orders of such officials pending their decision on points of law. There is no greater evil in the administration of the law than delay, and delay is usually due to faults of procedure. In India, at all events, the rules of the Evidence Act contribute greatly to this, as they are made the pretext for constantly interrupting the case with objections and interposing an argument on the admissibility of the evidence offered. Not long ago in the Chief Court of Burma, a criminal case<sup>(a)</sup> lasted three months, and this was only partly due to the large number of witnesses examined; much of the time was consumed not merely in making objections to the admissibility of evidence, but in hearing lengthy arguments on the subject. On more than one occasion the case was positively adjourned to allow counsel to look up authorities and produce rulings on the subject of admissibility, so that the case was protracted in a way that was little short of a scandal. "The real discussions which take place before a judge upon evidence are, as he (Sir William Markby) points out, not as to its relevancy but as to its admissibility."<sup>(b)</sup>

It is claimed for a law of evidence that it restricts the matter considered by the court and so shortens the period of hearing. If this object were secured it might somewhat excuse the fact that it inevitably shuts out much evidence that is undeniably relevant to the discovery of the truth. What, however, was intended as an instrument to quicken the trial of cases has proved to have a most unsatisfactory result: for the law has made a mistake in the admission or rejection of evidence so serious, that, in order to avoid

---

(a) *K. E. v. Birch and two others*, 1911.

(b) *Ameer Ali and Woodroffe*, O. C., p. 97.



it, judges will listen to interminable arguments on the point of admissibility, and, what is perhaps worse, are inclined in criminal cases to adopt the safer course of excluding rather than admitting evidence against the accused when objection is raised to it. By "safer course" we refer to the fact that they avoid thereby the chance of their decision being reversed on appeal or revision, as it is well known that the Government never appeals against an acquittal on the ground that evidence in favour of the prosecution was improperly excluded. That judges should show such pusillanimity is quite intelligible in England where, as Sir James Stephen says, "the extreme intricacy and minuteness of the law of England on this subject (*i.e.*, evidence) is principally due to the fact that the improper admission or rejection of a single question would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the Court for Crown cases reserved." (a) In India, section 167 of the Evidence Act, previously quoted (b), is supposed to prevent so preposterous an issue. Yet nevertheless "as the law stands an error in the reception or rejection of evidence may have the gravest consequences," (c) and judges exhibit at least an equal timidity on such points. The explanation is to be found in the attitude of the Appellate Courts, and the excessive importance they attach to compliance with rules of procedure. What mistrusts itself deserves mistrust, and the public mistrusts very much justice of this kind.

It is not only by the lengthy arguments which the rules of evidence introduce into the original trials that litigation is protracted, but also by the direct incentive which they give to appeals. There are numerous appeals instituted based purely on technical reasons relating to the admission of evidence and particularly second appeals, which would not be entertained unless some mistake of law were alleged. It has thus resulted that in alliance with the Courts of Appeal, the law of evidence, so far from conducing to shorten trials, has caused them to be lengthened, tends to make the

---

(a) Stephen : Introduction to Evidence Act, p. 73.

(b) See paragraph 12.

(c) Markby : Evidence, p. 117.

result of litigation uncertain and has a most demoralising influence on the minds of the judges. The aid it gives to the discovery of the truth may be measured by the dictum delivered by Judge Lush in *R. v. Roden* (a) that "the value of evidence cannot affect its admissibility." Surely no better proof than this could be given that the law of evidence has become a Juggernaut before which the legal profession bows down and which tramples beneath its car truth and justice.

\* The worship of precedents, rules and procedure has become an abuse which is obvious to most men and appears comic to those who do not suffer by it. Dr. Wilson writes :—"Recently I saw a case in which commonsense could have settled everything in a quarter of an hour. The judge said the only thing to guide him was a previous judgment in 1857, and he did not agree with that. However, he had to follow it, because it was a decision of a higher court. To any scientifically trained mind this appears wrong. Should not lawyers, like as in our profession, think independently guided by the latest knowledge?" (b) The same writer also quotes the following opinion of our law of a Dutch Judge :—"I was much struck with the description of our judicial system given by a judge in Holland. He said that when his people has a criminal they tried to improve him and get at the better part of his nature. In matters of judicial procedure he also added : 'We try to find out the truth and give each party complete justice. But you make a 'sport' of it. You arrange two sides with clever lawyers, each trying to baffle the other, and perhaps hide the truth, and watching over the game is an umpire, whom you call a judge. But this is not justice according to our idea. You may hang innocent men and consider it part of the game, or you may knowingly let off the greatest scoundrel.' This coming from a well educated, level-headed judge, struck me as a very remarkable statement." (c)

In the "Standard" of April 9th, 1912, Mr. R. P. Houston, M.P., wrote complaining of a grave injustice which the present procedure of the law courts encouraged. He said that it had become a practice of certain plaintiffs and solicitors in a commercial

---

(a) 12 Cox, 630.

(b) A. Wilson : Unfinished Man, p. 123.

(c) A. Wilson : Unfinished Man, p. 319.



action at law to allege fraud against the defendant for the purpose of prejudice, or to enable agreements to be set aside or closed, accounts to be re-opened, which without this charge could not be done. It is easy, he said, to keep these actions alive for years, during all which time the defendant has a charge of fraud hanging over him with which charge he is powerless to deal; for any attempt on his part to vindicate his honour is liable to be treated as "contempt of court." Men of position are thus often blackmailed. A plaintiff can with impunity allege fraud and throw mud at the defendant through the mouth of his counsel, and after the action is disposed of in favour of the defendant, go his way rejoicing that he has gratified his malice at the expense merely of the costs in the action. Mr. Houston concluded with the following words:—"These considerations.....call for a reform which public opinion alone can enforce, for lawyers are quite satisfied with the present procedure."

In the issue of the same paper of April 15th, 1912, the words of Mr. A. Calvert were quoted confirming what Mr. Houston said, and referring to a case known to him in which a barrister being asked to settle a statement of claim said, quite lightly, 'we must charge him (the defendant) with misrepresentations and fraud, and see what he says to that.' Neither the plaintiff nor his solicitor had advanced any such allegation, but on the advice of learned counsel the charge was made. Now this use of charges of fraud simply springs from the restriction in the law of evidence against allowing oral evidence to be given to dispute the contents of a document containing the terms of a contract, etc., between the parties, except on certain grounds of which fraud is the easiest to allege. This restriction has thus been converted by the legal profession into an engine of oppression.

We here conclude this chapter: our apology for its length is the refusal of the legal profession to admit any want of success on the part of the law, or the right of laymen to criticise their work. It must be clear to the reader that, in the face of this attitude, our preliminary step must be to show that there is something wrong in the administration of the law. It is only after we have done this that we can hope to obtain a hearing for our criticisms and suggestions.

## CHAPTER III.

### INTENTION.

Will defined—Intention and Will—Impulsive and Voluntary Acts—Impulse, Desire, Deliberation, Purpose, Resolve—Intention belongs to the higher forms of Will—Attention in Will—Instinct—Motive—Desire in Motive—Actions divided into two classes, those done on instinctive impulse and those done on conscious desire—Feeling determines action—Influence of the intellectual factor—Self-consciousness in Will—The legal theory that knowledge equals intention and that everyone must be presumed to know the natural results of his acts—Objections to the theory—Knowledge and Probability—Knowledge and Intention—Results as the criterion of actions—The theory an artificial one which does not deal with reality—it is further a *petitio principii*—and also unfair to the accused in criminal cases—Part of it inapplicable to particular cases—It is not consistently applied—Attempts of Judges to evade it—The doctrine also inconsistent with the language of the law.

It is proposed in this chapter to treat of Will, Voluntary actions, Intention, Motive, Impulse, Instinct and other similar mental states. Their importance in law and the numerous cases in which they have to be considered will become so plain in the course of the discussion that it is perhaps unnecessary to give examples at the outset : our object will be to give definite meanings to these terms and to point out where those accepted in law are opposed to the psychological view, and further to state the reasons why the present legal acceptations are unjustifiable or erroneous.

In every criminal act it is as important to prove the intention with which it was done as it is necessary to prove the deed itself, and as this is in many cases accomplished by presumption we shall have occasion to examine the validity of such presumptions as are usually drawn ; one method of doing so will be to compare them with what psychology teaches, and it will therefore be convenient to start with a few psychological conceptions.

Most people think that they know what they mean when they use the expression ‘ will,’ but when they compare their idea of ‘ will ’ with someone else’s, or examine some given instance in order to decide whether it was

Mental states  
treated of in the  
chapter.

Will.



an expression of will or not, they find that their ideas differ and they cannot define 'will' in terms sufficiently clear for their purpose. It seems necessary therefore to go to psychology to ascertain in what 'will' consists, and this investigation will not only discover 'will,' but at the same time separate it off from several other mental states. The reader who has a particular aversion to pure psychology is advised to pass on to the fifth paragraph of this chapter.

Perhaps the most fundamental thing in Will is the presence of an idea : we know of no definition of it which omits this, though it is also present equally in other states as, *e.g.*, Desire. The mere presence, however, of the idea is not sufficient, the idea must also be realized or at least attempted to be realized by the agent. Thus Green defined Will as "the action of an idea impelling to its realisation," (a) and Mr. Bradley, "Will is the self-realisation of an idea with which the self is identified," (b) and again "in volition we have an idea determining change in the self and so producing its own realisation." (c) The latter writer does not allow that it is a complete act of will unless the idea is carried out into fact, (d) and in order to do this the idea must be dominant : it is not the only element in the psychical state, but it is the one that makes the difference, and the important matter therefore is to ascertain the content of the idea, and whether and in what way the idea contributes or does not contribute to the result. (e)

He thus distinguishes 'Will' from 'Intention' and 'Resolve,' because we can have such states as mere Intentions and mere Resolves which do not issue in action, though he allows that they can partake of the nature of an incomplete act of will. (f) An accomplished intention is, however, a real volition.

Now, as to the character of the idea in Will, Mr. Bradley explains that it may be unspecified and general : we may act on the idea of avoidance or injury without the idea of injuring or avoiding in some

The idea in Will and Impulse.

(a) T. H. Green, *Prolegomena*, § 152.

(b) *Mind N. S.*, No. 49, p. 1.

(c) *Appearance and Reality*, p. 115.

(d) *Mind N. S.*, No. 49, pp. 7, 19, 26.

(e) *Ibid.*, p. 3 and *N. S. No. 44*, p. 438, *et seq.*

(f) *Mind N. S.*, No. 49, pp. 447-8.

particular manner, and in the course of the act the idea's content will in its process further particularise itself : this is how he regards impulsive actions. In such cases we do will to injure in general or simply to strike, but probably not to strike in any particular way or with any particular weapon or with any special result, and in considering these acts " the true question here is about the actual content of the idea, what that was, how unspecified it was, and how far the individual result can be taken as its proper self-realisation."

(a) and (b) As many cases of murder are of this impulsive kind we wish to draw attention to the above remarks, especially as the law appears to attribute in such cases to the doer a frame of mind which is entirely opposed to that which really exists in him : if the possibility of acting without reference to particulars in the way described by Mr. Bradley be doubted, we may remark that the same has been stated in different language by others. Thus, after speaking of the localization of images in the external world in hallucination and sensation and in the past in memory, the authors of *Animal Magnetism* go on to say " But these localizations in time and space are superadded acts, which are not essential and are often absent. We believe that it is the same with volition. The impulse is the fundamental fact, around which may be grouped the secondary states of consciousness which make the impulse a voluntary or involuntary act, or which assigns to it a given motive. These are accessory or superadded phenomena, not integral parts of the occurrence." (c) Similarly Professor Höffding says that the idea plays in impulse only the part of disposing the mind to move in a certain direction, as the idea of water in a thirsty person. (d)

Wundt also has distinguished between what he calls a simple  
I m p u l s i v e a n d  
v o l u n t a r y a c t s.
volitional act or impulsive act and voluntary  
 acts, (e) and an examination of this distinction  
 will be useful in aiding the reader to grasp more  
 fully the nature of the instinctive impulsive acts to which allusion  
 is frequently made in this volume.

---

(a) *Mind* N. S., No. 49, pp. 461-3.

(b) *Ibid.*, p. 463 note.

(c) Binet and Féré, *Animal Magnetism*, p. 295.

(d) Höffding, *Outlines of Psychology*, p. 92.

(e) W. Wundt, *Outlines of Psychology*, p. 206.



He approaches the matter from the side of the emotions, and says that in one class of these 'the emotional process may pass into a sudden change in ideational and affective content which brings the emotion to an instantaneous close; such changes in the sensational and affective state which are prepared for by an emotion and bring about its sudden end, are called volitional acts. The emotion together with its result is a volitional process . . . volitional act is the name of only one part of the process, that part which distinguishes a volition from an emotion . . . . in mere emotions there is an entire absence of those changes in the train of ideas, which changes are the immediate causes of the momentary transformation of the emotions into volitions, and are also accompanied by characteristic feelings.(a) There is no feeling or emotion that does not in some way prepare for a volitional act or at least have some part in such a preparation. All feelings, even those of a relatively indifferent character, contain in some degree an effort towards or away from some end. This effort may be very general and aimed merely at the maintenance or removal of the present affective state.'(b)

Now it is a simple volition when there is a single motive that determines it, *i.e.*, a single feeling together with its accompanying idea, and the movement in which it terminates is an impulsive act. It is distinguished from a voluntary act by the fact that in the latter there is more than one motive: several feelings and ideas in the same emotion here tend to produce external action, and when they tend at the same time towards different external ends, whether related or antagonistic, there arises a complex volitional process from which results a voluntary act.(c)

With this may be compared Professor Stout's statement quoted elsewhere, that voluntary action arises after internal conflict, and it is only after such a conflict that we get the idea of decision, resolution, choice, etc. The absence of these antecedent feelings of resolution and decision, Wundt regards as the essential reason for distinguishing impulsive acts from complete volitional

---

(a) W. Wundt, *Outlines of Psychology*, p. 201.

(b) *Ibid.*, p. 203.

(c) W. Wundt, *Outlines of Psychology*, pp. 205-206.

ones.(a) We have here then one ground for distinguishing impulsive acts from voluntary ones, *viz.*, that they spring from a single motive and are not preceded by a mental conflict. There is, however, another element in them which is also recognised by Wundt: "Another element," he says, "namely, the character of the feeling that acts as impelling force is, in popular thought, usually brought into the definition. All acts that are determined by *sense-feelings*, especially common feelings are generally called impulsive acts without regard to whether a single motive or a plurality of motives is operative." Although he declines to recognize this as a basis of discrimination, on the ground that it wrongly leads to a complete separation between impulsive acts and volitional acts as specifically distinct kinds of psychical processes, he nevertheless remarks: "To be sure, the earliest impulsive acts are those which come from sense-feeling. Thus most of the acts of animals are impulsive, but such impulsive acts appear continually in the case of man, partly as the results of simple sense emotions, partly as the products of the habitual execution of certain volitional acts which were originally determined by complex motives."(b)

To a psychologist like Wundt who traces the stages up from pure emotions, through simple volitions to voluntary acts proper, there is, of course, no warrant for anywhere drawing a hard and fast distinction of kind between the mental processes which he here analyses; we, however, are seeking to distinguish these acts for a different purpose, and to us it is allowable to lay stress also on this second ground of distinction which Wundt admits is present in the popular idea of what constitutes an impulsive act, *viz.*, that they spring from sense-feelings. The meaning of this is simply that the single emotion has full play and the action is the result of an entirely, or at least a greatly preponderating, affective state, whereas in the voluntary act which is the result of different mutually inhibiting feelings the final state may be an apparently unemotional one.(c) It is this latter state of mind which is ordinarily referred to in such expressions as 'premeditated,' 'malicious' and even 'intentional,' and the plain man regards a crime

---

(a) W. Wundt., *Outlines of Psychology*, p. 208.

(b) *Ibid.*, pp. 205-6.

(c) *Ibid.*, p. 208.



committed as the outcome of such a mental state as in a different class from the one described as the impulsive act. Now the lawyers' method of setting up a theory that knowledge and intention are the same thing, and that the knowledge can only be presumed from the results of actions, entirely abolishes the distinction between voluntary and impulsive acts against both the inclinations of the layman and the views of the psychologists which we have given above.

*Desire.*—When impulse is controlled by distinct ideas we have desire(*a*) which is not necessary for will, as Mr. Bradley holds: he describes it as a felt tension in the self(*b*), and so agrees with Wundt who says that it is not the uniform antecedent of will, but rather a process which only appears in consciousness when some inhibition of voluntary activity prevents the realisation of volition proper, and that though it may be present in the mind before a voluntary action occurs, it is not indispensable and often absent. (*c*) It may be that the feeling of desire is not always present, but what is aimed at in will is certainly always the object of desire, as will be clear when we come to speak of motives, and this is stated by Mr. Bradley himself in several passages(*d*); the only possible exception would seem to be cases in which we act on instinctive impulse, and here if the impulse is entirely without any consciousness of end, it is hardly will.

2. The states known as Deliberation, Choice, Reflection, Purpose, Resolve, occur in the higher forms of will, and they usually imply a contest between conflicting impulses and ideas and an interval between the thought and its execution. The ideas excite the feelings and memory, and if the object of the impulse is adhered to in spite of scruples, it becomes an aim, and we then speak of a purpose or intention to carry it out. It is only after a struggle of this kind that a man feels that he has acted according to his true self, *i.e.*, the permanent thoughts and feelings which have taken deepest root in him

---

(*a*) Höfding, *op cit.*, pp. 236, 322.

(*b*) Bradley, *Ethical Studies*, p. 239.

(*c*) Wundt, *Human and Animal Psychology*, pp. 225, 229.

(*d*) Bradley, *Ethical Studies*, pp. 65-66, 139, 232, 239; *cf.* also Stout, *Manual of Psychology*, p. 607.

and this state of mind is usually called Resolve, which differs from purpose or intention simply in degree. They are distinguished from mere impulse, as the latter knows but a single possibility, a single motive, while both they and will proper develop through the interaction or conflict of various motives.(a)

It will thus be seen that intention as understood in psychology is not a simple mental state but belongs to the higher forms of will, and an accomplished intention is both an act of will and an expression of the self. In what sense this latter phrase is used perhaps calls for further explanation. "In voluntary decision special conations and their ends are first considered in their relation to the total system of tendencies included in the conception of the self. . . . voluntary action does not follow either of the conflicting tendencies as such ; it follows our preference of the one to the other. It is the conception of the self as agent which makes the difference:"(b) and again Ribot writes, "The 'I will' testifies to a condition, but does not produce it . . . . The acts and movements which follow it (volition) result directly from the tendencies, feelings, images and ideas which have become co-ordinated in the form of a choice. It is from this group that all the efficacy comes."(c)

Dr. Stout finds the key of voluntary action, in the fact that it arises after internal conflict : the voluntary decision is the state of mind which emerges when the process of conflict ceases, because it has worked itself out to a definite conclusion, and equilibrium is restored, and he contrasts this with the action from a fixed idea, which realises itself through its mere isolated intensity.(d) Such conflict is only possible through the existence of the self, and although every intention may not be the outcome of such a contest many are, and all involve the conscious presentation of an idea to the self as the object to be carried out. Thus the same writer says : "Action is intentional so far as we have *ideal pre-vision of its course, the end to be attained, and its collateral consequences*. All actions due to voluntary decision are intentional. But the inverse

---

(a) Höfding, *op cit.*, pp. 327-9.

(b) Stout, *op cit.*, pp. 601-2.

(c) Ribot, *Diseases of the Will*, p. 133.

(d) Stout, *Analytical Psychology*, Vol. I, pp. 130-2.



is not true. Routine conduct may be intentional without involving any decision or resolution," (a) as an instance of which he gives eating at regular meal times. He also quotes the case of the man who 'simply drifts into his actual course of action:' here there is no determination at all on the man's part involving a comparison of ends and a preference, but two impulses or tendencies compete now one, now the other prevailing. Apart from these two classes of cases he apparently considers that all intention involves volition, and as regards both these classes we should be inclined to say that in so far as the idea of the end is not present or attended to there is no real intentional act, but that when action does take place it necessarily involves attention to the end, unless it be of the instinctive impulsive kind already described.

The importance of attention in will lies in the fact that we can  
**Attention in Will.**      augment the intensity of an excitation by attending to it, and voluntary movement takes place by directing attention to the idea of a movement. (b) Professor James' view is perhaps rather exaggerated, but deserves quoting as it illustrates what the effect of attention is: "Attention with effort is all that any case of volition implies. The essential achievement of the will, in short, when it is most 'voluntary,' is to attend to a difficult object and hold it fast before the mind. The so doing is the *fiat*; and it is a mere physiological incident that, when the object is thus attended to, immediately motor consequences should ensue"; and again, "effort of attention is thus the essential phenomenon of will," and "the difficulty lies in getting possession of the field. Though the spontaneous drift of thought is all the other way, the attention must be kept strained on that one object until at last it *grows*, so as to maintain itself before the mind with ease. This strain of attention is the fundamental act of the will, and the will's work is in most cases practically ended when the bare presence to our thought of the naturally unwelcome object has been secured. For the mysterious tie between the thought and the motor centres next comes into play and . . . the obedience of the bodily organs follows as a matter of course." (c)

---

(a) Stout, *Groundwork of Psychology*, pp. 231-2.

(b) Binet, *Double Consciousness*, p. 83; Sully, *Outlines of Psychology*, p. 35.

(c) W. James, *Principles of Psychology*, Vol. II, pp. 561-4.

As an important distinction will be drawn later between implicit knowledge and knowledge present in the mind at the time of action which appears to imply at all events some attention, it is necessary to exhibit here what the function of attention in voluntary action really is.

Instinct is more complex, more active and more conscious than reflex movement, and consists of the union of a strong feeling with certain sensations and involuntary motor impulses: the consciousness, however, is not of the actual end of the action. (a) Though originally an instinctive act is performed without foresight of the end and without previous education, instincts are modified by experience, and then become less blind, at all events in the case of man, who has memories, associations, inferences, and expectations. (b) Darwin explains instinct as inherited habit determined principally by the influence of the environment and the struggle for existence, but also to some slight extent by intelligence. This must complete for the present our sketch of the various mental states connected with will.

3. We must next explain 'Motive' and what it is that determines conduct. By 'motive' is usually meant an ulterior end, but what actually moves us is a felt contradiction, and a thought or idea moves us by exciting desire: desire therefore is the real stimulus. (c) It is the feeling excited by the idea of the end, or, as Wundt describes it, motives are internal causes of volition, and a motive is a particular idea with an affective tone attaching to it, and the combination of idea and feeling in motives only means that an idea becomes a motive as soon as it solicits the will, feeling itself being simply a definite voluntary tendency. (d) It will be well to dwell for a moment on the part played by desire. "Where, however, says Prof. Sully, "circumstances allow of a gratification of the desire, this passes into a new form, *viz.*, an impulse to carry out a particular line of action. A desire when thus transformed into an incentive or excitant to action is what we call a motive. A motive

---

(a) Höffding, *op cit.*, pp. 91, 248, 312.

(b) James, *op cit.*, Vol. II, pp. 383, 390.

(c) Bradley, *Eth. Stud.*, p. 233.

(d) Wundt, *Human and Animal Psychology*, p. 234.

is thus a desire viewed in its relation to a particular represented action, to the carrying out which it urges or prompts.”(a) Now desire does not always follow knowledge, but, on the contrary, “instances are by no means wanting of very imperious desires accomplished by the clear knowledge that their gratification will be positively distasteful,”(b) and it seems necessary to point this out in view of the accepted legal doctrine that intention is equivalent to knowledge, which will be examined later.

At the same time it must be observed that a motive is not something distinct from ourselves which moves  
**The self in motive.** us from the outside, but it is always the individual himself from a definite side : our motives are determined not only by our original nature but also by our earlier volitions and actions.(c) “Motives are not mere impulses,” says Prof. Stout, “they come before consciousness as reasons why I should act in this or that way .....the motives are motives only in so far as they arise from the nature of the self, and presuppose the conception of the self as a determining factor.”(d) The same idea is differently expressed by Wundt when he says that the uncertainty of the connection of motive and volition is due, and due only, to the existence of the personal factor, and that the direct effect of a motive is on personality.(e)

We may now divide actions into two classes—a distinction on which much stress will be laid later—according as acts are done with or without a motive.  
**Two classes of actions.** This classification is made by Mr. Bradley as follows :—“(1) Everybody knows that there are actions which we say we do without a motive ; there are acts in the first place, not preceded even by the (conscious) idea of the act to be done ; and in the second place (and these latter are more important), there are acts which are done thinkingly and on purpose and which yet are done without any ulterior intent beyond the act itself ;

(a) Sully, *op cit.*, p. 392.

(b) J. Ward, Art. Psychology, *Encyclopædia Britannica*, 9th Edn., Vol. XX, p. 74.

(c) Hoffding, *op cit.*, p. 345.

(d) Stout, *Manual of Psychology*, p. 605.

(e) Wundt, *op cit.*, p. 433.



and here for our minds there is no 'because,' we do what we want, and it is simply a mistake to suppose that in and for our minds there is another and a further end represented, which suggests the act or to which the act is a means. (2) And where we act, as we say *with* a motive, where we have in our minds a reason, an aim, an object beyond the act, which the act subserves, there these motives, these thoughts of ends or objects to be realized, are of very different kinds. The motive to the act may be the thought of another particular act, or of the whole of a complex scheme ; it may be the idea of an end which my action is to bring about, the pleasure or the happiness, the pain or the ruin of another : in a word the idea of any event, the thought of whose realization by certain means excites desire or want, and so is a motive." (a)

This division then is into actions on instinctive impulse and actions on conscious desire for this or that either with or without the idea of an ulterior end (b) and we contend that the "intention" in the doer is different in each case, and the same intention should not be attributed to him merely because the results are the same as the law at present does. It is in murder cases in particular that the point is important, and we shall therefore enforce the existence of the first class of acts by another quotation : "Nevertheless all the authors whose works I have consulted," said Darwin "with a few exceptions, write as if there must be a distinct motive for every action, and that this must be associated with some pleasure or displeasure. But man seems often to act impulsively, that is from instinct of long habit, without any consciousness of pleasure, in the same manner as does probably a bee or ant when it blindly follows its instincts. Under circumstances of extreme peril, as during a fire, when a man endeavours to save a fellow creature without a moment's hesitation, he can hardly feel pleasure ; and still less has he time to reflect on the dissatisfaction which he might subsequently experience, if he did not make the attempt. Should he afterwards reflect over his conduct, he would feel that there lies within him an impulsive power widely different from a search after pleasure or happiness ; and this seems to be the deeply planted

---

(a) Bradley, *op cit.*, p. 230.

(b) Bradley, *op cit.*, p. 232.

social instinct.”(a) Speaking of such actions Wundt says that the majority of the acts of animals are impulsive and also human actions in the earlier stages of development.(b)

Finally the writers are unanimous to the effect that what determines conduct, voluntary and impulsive alike, is not intellect or ideation, but feeling and that although in will there is an ideational element it is through feeling that it influences action. Thus Ribot quotes with approval the saying of Spinoza that “ appetite is the very essence of man..... Desire is appetite with consciousness of self..... From this it results, that the foundation of effort, volition, appetite and desire, is not the fact that a person has adjudged a thing to be good ; but on the contrary, a person deems a thing good because he tends towards it from effort, will, appetite and desire.(c)

Similarly Prof. Höffding : “ Everything which is really to have power over us, must manifest itself as emotion or passion. Mere ‘ reason ’ has no power in actual mental life, where the struggle is always between feelings. The frequent talk of the conflict of reason with the passions is consequently psychologically incorrect. No such conflict can take place directly. A thought can suppress a feeling only by exciting another feeling which is in a position to set aside the first.”(d)

So also Prof. James says “ there is no material antagonism between instinct and reason. Reason, *per se*, can inhibit no impulses, the only thing that can neutralize an impulse is an impulse the other way. Reason may, however, make an inference which will excite the imagination so as to set loose the impulse the other way,”(e) and Wundt is very explicit to the same effect : “ But motives are always accompanied by feelings and the feelings further appear to us as those elements of the motive which contain the real reason of the activity. Without the excitation which feeling furnishes, we should never will anything. A mind which contemplated things with entire indifference as ‘ pure intelligence ’

---

(a) Darwin, *Descent of Man*, vol. i, p. 184, Note.

(b) Wundt, *op cit.*, p. 232.

(c) Ribot on Attention, p. 107.

(d) Höffding, *op cit.*, p. 284.

(e) James, *op cit.*, Vol. II, p. 393.

could never possibly be roused by them to volition or action. Feeling therefore presupposes will and will feeling ;” and again “ it remains completely unintelligible how a decision of will can arise purely from intellectual processes. Introspection invariably points to feeling as the antecedent of will ; but feeling, as we saw above, is not separable from it, since it always implies a certain tendency to will in one way or the other.”(a)

That conduct is guided really by emotion and not by knowledge or understanding, and that intellect is not a power but an instrument which is moved and worked by forces behind it, *viz.*, the passions, is insisted on by Herbert Spencer, who concludes that it is only by awakening appropriate emotions that character can be changed.(b)

4. The object of demonstrating the importance of feeling in determining action is in order to render it plain that any doctrine which accounts for action merely by knowledge is psychologically false. At the same time we must not be taken to deny any influence to the intellectual factor in will : in addition to the power of ideas to excite the feelings, it is by means of the intellect that man imaginatively moves into the future and forecasts events. Intellect also multiplies occasions for desire, and includes in the mental forecast undesirable as well as desirable results of action : hence the opposition of impulses.(c) But this arises in the higher or reflective stage where the interval before action is prolonged, and specially where we have general aims, *e.g.*, health, thrift, etc., leading to consistent courses of action. We doubt, however, whether it has any influence in the instinctive impulsive actions described above.

Here we must notice the argument that self-consciousness is not necessary for will, for though responsibility begins with self-conscious volition, we afterwards become answerable for acts of will not self-conscious, because now we know their character and ought to

(a) Wundt, *op cit.*, pp. 224, 228.

(b) Herbert Spencer, *Social Statics*, pp. 170, 172-3.

(c) Sully, *op cit.*, pp. 410-1, 413.



have them under control. In most of our actions we act from habit and without reflection: habits are all important and these need not be self-conscious, yet we are responsible for them because what makes the habit is within the region of conscious volition. The habits we encourage or suffer, we are aware of or might be aware of: we know their moral quality and hence are responsible for them. Our character formed by habit is the present state of our will, and though we may not be fully aware of its nature yet morally it makes us what we are. Our will is not this, that, or the other conscious volition, nor does it exist just so far as we reflect upon it. It is a formed habit of willing.(a)

Similarly Professor Sully says: "The final decision after deliberation, if a rational and good one, does not need to be arrived at again and again, in all similar cases. A particular exertion of self-control, say the quelling of a feeling of annoyance...which in the first instance was the outcome of a process of reflection, will, in succeeding cases, be shortened or compressed into control without such preliminary reflection. Here we may see that the process of self-control is becoming habitual in a new sense. Certain motives are acquiring a fixed place in the mind as ruling forces, organically connected with appropriate actions, while other and lower forces are losing ground."(b)

As a question of moral philosophy we do not dispute this theory of moral responsibility, though we must point out that the latter writer admits a certain limitation to it, *viz.*, that the habitual, that is the relatively unconscious and mechanical, comes in only so far as features and situations of the environment recur in perfectly like form, and so require similar modes of re-action. Now, while it is true that the external conditions of human life, physical and social, are so far recurrent that our actions may be organised into a certain number of persistent forms or types of conduct, as thrift, temperance, fulfilment of promise and the like, they are not so uniform in their actual concrete combinations as to allow of our particular actions becoming in the complete sense habitual. Again, there is a limit of another kind due to the strength of feeling which the same writer describes: "Thus there is a state of lethargy, or

---

(a) Bradley, *Eth. Stud.*, pp. 218-9. (b) Sully, *op cit.*, p. 438.

depression of active energy, out of which even the most powerful motive may fail to rouse the subject. At the other extreme there is a strength of instinctive or 'organic' impulse which no ideational motive can overcome . . . no moral or other consideration will hold back a man from slaking his thirst when the appetite reaches a certain intensity.' (a) To fail to take account of this is to overlook the limits of human powers. But we are not maintaining a thesis that the man who acts on instinctive impulse is not at all responsible for his acts, but that where the law prescribes that in order to be guilty of a special offence he must be shown to have acted with a special intention, such intention in his case does not exist and should not be presumed, merely on the ground of knowledge, much less on the ground not of his knowledge but of the knowledge of the average man, whoever this phantom may be.

The kind of cases we have in mind are those in which the agent acts under the influence of some strong emotion, especially anger, during which the state of his mind is practically blindness or blankness of ideas, as, *e.g.*, is described in Professor Stout's analysis of Anger. (b) There is merely a general impulse to crush and destroy or to vent itself on something, by preference on the cause of irritation, but not necessarily so; just as ants, when corrosive sublimate is sprinkled on their paths, in their blind rage attack one another.

The nature of this mental process may be realised by considering its relation to instinct. There are certain principal powerful instincts each of which conditions some one kind of emotional excitement. One of these is the instinct of pugnacity and the emotion which it generates is anger. Mr. McDougall ranks this instinct with fear on account of the great strength of its impulse and the high intensity of the emotion it causes. That anger is a true primary emotion or simple instinctive impulse is indicated clearly by the fact that it is displayed in the instinctive activities of the higher animals and that it occasionally appears in human beings with a morbidly exaggerated intensity. (c) Similarly Prof. Sully speaks

(a) Sully, pp. 440-1; p. 436.

(b) Stout, Manual of Psychology, pp. 319-323.

(c) W. McDougall, An Introduction to Social Psychology, pp. 46-59.



of the instinctive feeling of anger and its characteristic manifestation in early life as a strictly instinctive re-action. He points out the fundamental opposition of such violent emotional agitation to intellectual activity.(a) The immediate nature of the re-action in anger may be gathered from Mr. Marshall's remark that we do not strike as the result of anger, as is commonly assumed, but the emotion is the coincident of the instinct action. We are angry and we strike at one and the same moment.(b) From this it will be clear why we use expressions like 'instinctive impulsive' when speaking of these cases and we hope that it will also be plain that their nature is such as to exclude the stream of ideas which, as we shall see, is commonly attributed by the law to one acting under such emotion.

5. The reader who has persevered is probably by this time weary of psychology and will welcome some application of it to law. The first legal doctrine that we shall examine may be described briefly as 'the knowledge equals intention theory : ' this is further united with a second theory that ' every person must be taken to intend the natural consequences of his acts,'(c) and so in its complete form we get the doctrine constructed as in the following quotations : " It is not, however, to be supposed that direct evidence of the prisoner's mental condition is necessary. The circumstances which prove the act will in general prove the knowledge or intention. It is a fair presumption that every man knows the probable result of the act which he does, and if he knows the result, then it is an equally fair inference that he intends it, i.e., that in doing the act he contemplates that it will lead to that particular result (*R. v. Pooshoo*, 4 *Suth. Cr.* 33 : s.c. 1 *Wym.*, *Cr.* 9)."(d)

Again the same author says : " Section 86 lays down no rule as to the inference of intent in cases of intoxication, but there seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law. Intention is sometimes a presumption of law ; sometimes it is a mere fact, to

(a) J. Sully, *The Human Mind*, Vol. II, pp. 60, 67, 87.

(b) H. R. Marshall, *Consciousness*, pp. 108 sq.

(c) *Best on Evidence*, § 344.

(d) J. D. Mayne, *Commentaries on the Indian Penal Code*, 13th Ed., p. 262.



be proved like any other fact. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention ; since, assuming, the knowledge, the law will allow no other explanation of the act to be given.”(a)

As to what are ‘ natural, probable or necessary consequences ’ of an act, the only method of deciding laid down by the legal text-books that we know of, is with special reference to civil liability though used apparently in criminal cases,(b) viz., that those consequences only are natural and probable which a person of average competence and knowledge being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.(c) The method, therefore, is by reference to the capacities of a normal or standard man ; and it is in fact used with reference to both civil and criminal law. Thus Sir William Markby when speaking of intention in general says :—“ We compare the conduct of the person doing an act with that of an average man and by this comparison we determine whether or not he was acting intentionally or heedlessly or rashly ”(d) distinctions which are of importance in criminal law.

Our objections to the theory are that it is built upon assumptions and no other basis, and that these assumptions are in fact false and opposed to the teaching of psychology : further that it is a *petitio principii* and unfair to the accused, it is not consistently applied, and the part of it which concerns the decision of what is natural and probable is impossible of application.

---

(a) J. D. Mayne, The Criminal Law of India, 3rd Ed., p. 427.

(b) *Q.-E. v. Nana*, I. L. R., 14 Bom., 260, 267.

(c) Pollock on Torts, 6th Edn., pp. 30-1.

(d) Markby, Elements of Law, p. 125.

**Knowledge and  
Probability.**

The first assumption is that you can know the probable, and to this we demur : such an assumption appears to involve ignorance both of the sphere of knowledge and of the meaning of probability. “ It would appear,” says the late Professor Robert Adamson, “ that knowledge extends to facts immediately present in consciousness, and to certain relations true of all facts of sensible experience ; but in neither of these classes of cognition does there seem to be given an absolute guarantee for the *existence* of any fact which is not immediately before us.”(a) We can also know all propositions of apodeictic certainty such as those of mathematics, but the probable is the subject of belief, conjecture, opinion, and similar states of mind. A probable conclusion is held only with a certain degree of conviction just because we have not full grounds of knowledge but only partial grounds, and the degree of certainty we have varies with our past experience of the frequency of an occurrence or our information about it.(b) For further remarks on this point, reference must be made to the chapter on Belief.

Now, we do not wish to insist unduly on the psychological meaning of these terms, but we would suggest that if the assumption that ‘ every one knows the probable result of the act which he does ’ be translated into ‘ everyone can have a belief as to what may be the result of his act,’—which is all that we are warranted in saying—we should less readily go on to draw the second presumption that he did therefore necessarily intend the result. The error of supposing that a man knows the probable result is doubtless due to the common fallacy of reading into the agent’s mind what we feel ourselves after the event : for we are then dealing with the past, not the future, and so have knowledge about it, but the case was different with the actor whose state of mind was quite unlike ours, and it is extremely difficult for us to grasp what his belief—let alone his knowledge—would have been under the circumstances. His own statements on such a point are really the most valuable information we can get, but it is the practice of the

---

(a) R. Adamson, Art. ‘ Belief,’ Encyclopædia Britannica, 9th Edn., Vol. III, p. 532.

(b) L. T. Hobhouse, Theory of Knowledge, p. 292 *et seq.*

lawyers to reject them and rely instead on what a so-called average man would have known or believed in like circumstances, and some even go so far as to say that it is immaterial what the man himself actually believed or intended.

The second assumption is that if a man knew the probable results, he must therefore have intended them, which is equivalent to saying that knowledge and intention are the same thing. The purpose of our psychological analysis of 'Will,' 'Intention' and other mental states in the earlier part of this chapter was to show that intention belonged to the higher forms of will: that it always involved the presence of an idea in the mind and an expression of the self: and that it is feeling and not intellect or knowledge that determines action. Desire, we showed, was the great stimulus to act, and desire and knowledge are often opposed: indeed though the writers lay stress on impulse, desire, the idea of the end, and attention in will, none lays stress on knowledge as such, and all agree that a purely intellectual state would not produce action.

We cannot refrain from briefly quoting here some further opinions on this point. "Man acts *before* he theorizes," says Professor Höffding: (a) and again "An activity of thought entirely free from feeling . . . does not exist. It is because of the movements of feeling accompanying all ideas and thoughts, that knowledge becomes a power in the mind," (b) and again "the close relation between feeling and will appears from the fact that only a strong and lively feeling serves as a motive to the will. Cognitive elements do not in themselves lead to voluntary movement." (c)

We, therefore, on psychological grounds, protest when the lawyers single out knowledge, and explain action by it entirely, to the complete exclusion of feeling. This they are only able to do by identifying it with intention, on the strength of an assumption which is false according to all the psychological evidence, and they thus

---

(a) Höffding, *op cit.*, p. 2. (b) Höffding, p. 95.

(c) Höffding, p. 99.



simply neglect the mainspring of action and attribute to the doer a condition of mind which he never has.

We have further to object that they ignore the difference between knowledge being present merely and being active in intention, a distinction which is recognised elsewhere, even in law. Thus speaking of acquiescence it is said : “ Acquiescence and waiver are always questions of fact. There can be neither without knowledge. And the knowledge must be actual not merely possible or potential.”(a) Measuring the knowledge as they do by the results of the action, they infer that a knowledge equivalent to such results must have been necessarily employed at the outset of the act. Now, even if the knowledge assumed is at any time implicit in the agent, it may well be that it was not present to him and utilised by him at the time he acted, and we have no hesitation in asserting that such must be the case in actions done on instinctive impulse, such as we have already alluded to, as *e.g.*, in moments of blind rage when the mind is practically blank or without any but the most general idea. To be implicit is not enough : “ what is apprehended implicitly is never for consciousness the same as what is apprehended explicitly.”(b)

That the state of mind in which anger predominates is not one in which the idea of consequences, the future, &c., can be present is plain from the nature of emotion. It is clear that such states are ones in which emotion either has complete sway or at all events prevails over any intellectual state. In anger the primary element is emotional, *i.e.*, an emotional tendency going in the direction of impulsive movement, an instinctive unconscious movement. On the other hand images, ideas and intellectual states of all sorts act by way of arrest so that the resultant emotion is composed at the same time of movements and inhibition of movements. In the states we allude to the acts and the immediateness of them show that the intellectual state is absent, but this is just what the law assumes is there.(c)

---

(a) Pollock, Principles of Contract, p. 591.

(b) Stout, Groundwork of Psychology, p. 134 : for more on this subject, see also pp. 212 *et seq.*, where it is treated from the side of attention.

(c) Ribot, The Psychology of the Emotions, pp. 265-6.

6. The method of judging intentions purely by results even though you insert the qualification 'natural' and 'probable' is a radically bad one: in moral philosophy they are opposed to one another as separate criteria of conduct, and the Utilitarians have long been condemned for their exclusive attention to results. In law the same method has been pursued, but through the astounding use of knowledge as a link they have in the end been positively identified, or at least used as identical, to the complete disregard of actual facts. It puts on a level acts that are not really the same merely because they have resulted similarly: if you look only to the consequences, it then follows that if bad actions produce good consequences they are not to be restrained, which is merely the Jesuit doctrine that the end justifies the means turned inside out.<sup>(a)</sup> We are aware that law does not profess to follow the rules of moral philosophy, but we doubt whether our legislators would be content to admit that they have simply accepted the Jesuit maxim as their criterion of conduct where intention is concerned. Of course, the reply will be, but how else can you estimate intention? In fact, it may be given in Sir Frederick Pollock's words: "The wrong-doer cannot call on us to perform a nice discrimination of that which is willed by him from that which is only consequential on the strictly wilful wrong. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay more it would in the majority of cases make no difference if the wrong-doer could disprove it. Such an explanation as this, "I did mean to knock you down, but I meant you not to fall into the ditch," would, even if believed, be the lamest of apologies, and would no less be a vain excuse in law."<sup>(b)</sup>

Now, it seems to us that the difficulty of ascertaining the truth is no reason for inventing an artificial system which does not apply to the facts but gives false results and works injustice to the accused: if, however, others disagree with us as to this, let them at least be honest and admit that their system is one of make-belief which does

(a) Cf. an article on Sir Leslie Stephen in the *Standard* of February 23rd, 1904.

(b) Pollock on Torts, p. 34.



not profess to deal with the real facts, with real men and real human conduct and real intentions, and let them simply plead that they can do no better owing to the difficulty of the circumstances and must therefore ask us to accept fiction for fact. But this is not their attitude : they profess to prove when they merely assume, or presume, which comes in this case to the same thing ; they speak of their presumptions as ' fair ' ones, and they assert that they deal with daily life, and hence there is no hope that they may be led to adopt better ideas. The point is, says Mr. Bradley, what is before the mind in the act ?(a) They do not even look at the mind. ' Is the end only before the mind with blindness to the possible result ; or is that result considered ?(b) " There is a difference between the mere foreseeing that in fact the effect will follow, and contemplating that effect and setting it before me as my end." '(c) They say, there is no difference : we will not even look at the end but only at the result and treat all cases alike.

In intention there is direction towards an end, in knowledge there is not : they say knowledge and intention are the same thing. What we desire must be in our minds, we must think of it. Intention must imply that we mean it, have it in our minds. An act supposes that what was in the mind was carried out.(d) They say it does not matter what the individual means or desires, we look to what seems probable to the average man, and they further look at it *post factum*. If we are to decide whether an instinctive act is in any case a volition we have to enquire first if it is the result of a foregoing idea, and in the second place, if that idea is found, and the action is therefore will, we have next to ask ' what precisely is contained in the idea.' They say we are not concerned with ideas and their contents, but with results of acts only.

Psychology shows that action is determined primarily, and always to some extent, by feeling and never by the intellect alone. They neglect feeling entirely and profess to explain actions rightly by knowledge alone. In short, they do not attempt to answer a single question of those which must be answered in order to discover

---

(a) Bradley, *Eth. Stud.*, pp. 256, 277.

(b) *Mind*, N. S. 46, p. 159.

(c) Bradley, *Eth. Stud.*, pp. 75-76.

(d) *Mind*, N. S. 49, p. 3.



intention, but substitute instead something altogether different and thus we maintain are not dealing with reality.

We further assert that their method of procedure, stripped of its legal jargon, is nothing but a naked *petitio principii*. It is the duty of the prosecution in a criminal case to prove the offence, *i.e.*, both the fact of the deed and the intention with which it was done ; they merely prove the fact, and then say that the intention must be presumed from it. Now, we do not wish to be misunderstood on this point : it is not our desire to assert that the intention either ought to or can be proved by the same kind of evidence as that by which the fact is proved, inference must be employed. If, however, you are going to infer knowledge, it must be from the party's means of knowledge at the time, including his state of mind as far as the witnesses observed and can testify to it and the circumstances suggest ; to assume that his knowledge was either the same as your own or that of the average man—if you really can frame any conception of such a person—and further to assume that such knowledge is equivalent to intention, appears to us to be merely begging the question twice over, and in the latter case to be doing it against the psychological evidence.

To presume dishonesty generally from the unexplained possession of stolen goods is a different matter from presuming a special intention of the kind that it is necessary to prove in order to find a man guilty of murder under the Indian Criminal Law, and we believe that by means of the aforesaid *petitio principii* this is not only frequently but also sometimes wrongly done. Indeed authority can be quoted in support of our view so far as special intention is concerned. “ But where a specific intent is required to make an act an offence, the doing of the act does not raise a presumption that it was done with the specific intent.”<sup>(a)</sup> This principle, however, is, we believe, not carried out, or at least is evaded by throwing the burden of proof on the accused. Thus it is said : “ So a party who is proved to have killed another is presumed in the first instance to have done it maliciously, or at least unjustifiably and consequently all circumstances of justification or extenuation

---

(a) Lawson on Presumptive Evidence, 490, Rule 97.

are to be made out by the accused, unless they appear from the evidence adduced against him.”(a)

We should perhaps explain that the justification for this course usually given is that the accused has in the first instance done a wrongful act,(b) and this serves to reconcile the unthinking mind to throwing the burden of proof on him to clear himself. In the above instance this ground is tacitly taken by the use of the word “killed” which suggests to most minds a wrongful act in the sense of one done with a bad intention. Yet it is quite clear that the action need not have been at all of this kind for many persons are killed by human agency without the display of any such intention. The fact is that the law assumes at the outset that a wrong intention has been employed by an argument which again is a *petitio principii* as explained in detail with reference to the law of libel in chapter IV paragraph 10. It is so, as there pointed out, because in law an act to be regarded as criminal at all must in the first instance include a wrong intention and this is exactly what is assumed here by the use of the word “wrongful.”

7. The unfairness of the doctrine to the accused consists in attributing to him a state of mind which never existed in him, at all events in some cases, and making no effort to find out what his real mental condition was at the time of the act. In their efforts to establish a kind of mechanical certainty in the realm of mental law our lawyers have attempted to bring qualitative diversities of individuals within the range of quantitative description, by assuming that so much results equals so much intention, all intention being alike in kind. The fact that all mental states are not alike they have got over by identifying intention with knowledge, of which they are only acquainted with one type. They have then lost sight of the fact that the result is merely a hypothesis which the legal mind has elaborated in order to render the facts conceptually manageable, and treating it as a reality have vainly striven to force it to apply in every case that

Unfairness of the doctrine to the accused.

(a) Best on Evidence, § 433 : Taylor on Evidence, § 118.

(b) Cf. e.g., the judgment of Bramwell, B., in *R. v. Prince*, L. R., 2 C. C., 154, quoted with approval by Mr. Mayne, O.C., p. 366.



arises, ignoring all individual differences. It is like requiring all men to fit a coat of one size and not the coat to fit the man, and owing to this demand the delinquent is often found guilty of a greater crime than would otherwise be imputed to him. We are speaking particularly of the impulsive instinctive type of action. If the man really did put before him in idea all the natural results of his act, he often would not commit it: it is just because he has not done so, but acts without an idea of the real consequences before him, on mere impulse, that he loses what would otherwise deter him, and does in fact commit the deed. Yet you credit him with just that exercise of knowledge which he has not had, with having done what he has not done, and punish him accordingly.

We have elsewhere described what we conceive to be the state of mind of a man under the influence of a strong emotion, such as anger: it is rather that of blankness than knowledge, and further as a mere question of time we doubt the possibility sometimes of cramming into the interval between the occurrence of the impulse and the act, the knowledge contained in the lawyer's presumptions. The importance of attention in will has been already referred to, and voluntary attention to the consequences is equally required for intention: this demands a certain interval. According to Büchner "Various ingenious experiments have proved that the swiftest thought that we are able to evolve occupies at least the eighth or tenth part of a second," (a) and psychology has made attempts to measure the velocity of thought by experiments with 'reaction times,' 'discrimination times,' &c., (b) but the results are not sufficiently certain to justify their application here, and no exact statements will therefore be hazarded as to the rate of mental pace. It may, however, be safely asserted that the process of foreseeing results is a complex one in which the judgment has to be used and inferences made from past experience.

It is a further objection to the doctrine that although the knowledge of all men is not equal, it clearly matters nothing what any

---

(a) Force and Matter, New York, 1891, p. 241.

(b) See Höffding, *op cit.*, p. 94; James, *op cit.*, Vol. I, pp. 85 *et seq.*, 427-485, 526-7; Wundt, *op cit.*, pp. 268-81.



one actually does know : for, without any reference to that, a ready-made knowledge is assigned him, and whatever his education or opportunities or experience may have been, all that is deemed irrelevant, even if he could prove them. For what is considered is not the knowledge of the agent but the knowledge of the average man, and if the individual does not happen to come up to the average, so much the worse for him. At least this is the theory ; for we do not ourselves believe in the existence of this normal man in any shape or form, nor do we think that even if he could be imagined,

Part of it in fact  
inapplicable to par-  
ticular cases.

he could be successfully employed as a standard in any particular instance. The reasons for this view are set out in the chapter on “ the normal man,” and therefore we shall merely

cite here the conclusions arrived at there, which are as follows :— That the person of average knowledge has no existence, and such a conception is impossible of application to particular cases : the standard is really a sham, and the person who professes to apply it in fact substitutes himself for the supposed normal man : if it could be applied at all, it would have to be so frequently varied and altered that it would no longer deserve the name of a general or universal standard.

8. Finally we desire to shew that the doctrine is not consistently applied and is not in fact laid down in

The doctrine is  
not consistently ap-  
plied.

the law itself, the language of which is rather at variance with it. Sir William Markby defines intention as the attitude of mind in which the

doer of an act adverts to a consequence of the act and desires it to follow and expressly distinguishes it from knowledge on the ground that in knowledge there is no such desire. He adds that it is not permissible to treat the two attitudes as one, as Austin does. In speaking of the Indian Penal Code he says that in their definition of murder the framers introduce ‘ knowledge ’ as a state of mind differing from intention and that by knowledge they must mean ‘ knowledge with advertence ’ to the consequences.(a)

Speaking of False Imprisonment cases, and discussing what is reasonable cause of suspicion to justify arrest, Sir Frederick Pollock

---

(a) Markby, *Elements of Law*, pp. 117-120.

says: "It is obvious also, that the existence or non-existence of reasonable cause must be judged not by the event, but by the party's means of knowledge at the time." (a) Yet this is really nothing but a question of intention, for the only reason why you wish to discover whether there was reasonable cause for the accusation is in order to decide what the intention of the complainant was in the matter. If, therefore, this is the right method to employ here, why not also in other cases where the intention has to be decided, as *e.g.*, in those of murder?

Again, the same author admits the difficulty to which we have already alluded in the following words: "That which appears the best way to a court, examining afterwards at leisure and with full knowledge is not necessarily obvious even to a prudent and skilful man on a sudden alarm." (b) Is not this a caution against the present method of coming to a conclusion as to what would appear natural and probable under the circumstances, in order to impute knowledge of it to the agent? Surely you do not imagine that you, in cold blood, represent the agent's real mood at the time, or can construct an average person to share such feelings!

That intention and knowledge are not the same appears to be admitted in the case of *Q.-E. v. Tulsha*, where a woman administered *datura* to three members of her family, and it was held 'that she must be presumed to have known that the administration of *datura* was likely to cause death, though she might not have administered it with that intention.' (c) This appears equivalent to saying that though she had not the intention she must be presumed to have had it because she had the knowledge, or at the very least involves a deliberate presumption against admitted probability. Considerable distrust of the doctrine is further shewn in the following passage by the same authors: "The reasoning should be not: 'all acts of a certain class have a specific intent, and this act being of that class consequently has such intent;' but 'the circumstances of the case make it probable that the act was done intentionally

(a) Pollock on Torts, p. 221.

(b) *Ibid.*, p. 460.

(c) *Q.-E. v. Tulsha*, I. L. R., 20 All., 143, as quoted on page 733 of Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act.



or maliciously.' The process is one of inference from fact not of predetermination by law." (a)

Again, in a well-known case Sir Barnes Peacock said : " From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such presumption ; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case." (b)

Referring it would seem to false representations it is said : " Generally speaking it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been thus stated ; what a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man paying that attention which every man owes to his neighbour in making a representation would have acquired in the particular case by the use of such means." (c) Compare this with the following relating to estoppel, " so also is it immaterial to know what the motive or the state of knowledge is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct, &c." (d) We do not say that a lawyer could not reconcile these passages,—though for ourselves we should not like to have to do it, but we do say that if, in order to presume knowledge, it has to be ascertained what are the special means of knowledge of the individual, this is a different method from neglecting the individual altogether and looking merely to what would seem probable to an average man under such circumstances.

---

(a) *Q.-E. v. Tulsha*, I. L. R., 20 All., 143, as quoted on page 733 of Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act.

(b) *Reg. v. Gora Chand Gope*, B. L. R., Sup. Vol., 443.

(c) Ameer Ali and Woodroffe, *op. cit.*, p. 735.

(d) *Ibid.*, p. 757.



That some judges have felt there is really something wrong in the doctrine we are criticising seems to us to be shown by their anxiety to avoid its effects.

Indications that some judges distrust the doctrine.

It is clear, and indeed this is expressly stated by the court in more than one case,(a) that according to the Indian Criminal Law a capital sentence is the usual penalty for murder, and in order to reduce it mitigating circumstances should be shown ; in spite, however, of this, one Judicial Commissioner actually laid it down that a capital sentence is not called for when the offence is brought merely under the fourth paragraph of s. 300 of the Indian Penal Code (which defines murder).(b)

Again another Judicial Commissioner sets out a number of circumstances under which, though the offence was murder, a capital sentence should not be passed, viz., when the offender was under 18 years of age, when there was no intention to commit murder, the offence falling under the fourth clause of s. 300 of the Indian Penal Code, when the murder, though intentional, was committed without premeditation, and in the heat of passion, without special brutality, when there was grave provocation, but the provocation was not also sudden so as to reduce the offence to culpable homicide, when there was reasonable doubt as to the sanity of the offender at the time of the murder though actual insanity was not proved, and where the offender acted under the instigation of another and did not take a principal part in committing the murder.(c)

This advice has subsequently been dissented from by the Chief Court of Lower Burma.(d)

Similar efforts have been made in another form, viz., by holding that wounds of a certain depth made by stabbing instruments would not under ordinary circumstances cause death, the facts being painfully strained to evade the legitimate conclusions of the doctrine in question,(e) some of which decisions have again been expressly overruled in later cases.(f)

(a) Printed Judgments, Lower Burma, p. 550, Burma Rulings, p. 216.

(b) Selected Judgments of the Court of the Judicial Commissioner of Lower Burma and the Special Court, p. 459 (*Nga Po Aung v. Q.-E.*)

(c) Printed Judgments, Lower Burma, p. 114 (*Moung U & Ors. v. Q.-E.*)

(d) Lower Burma Rulings, p. 216. (*Crown v. Nga Tha Sin.*)

(e) *Mi Ni v. Q.-E.*, S. J., L. B., p. 300 ; *ibid.*, p. 508 (*Q.-E. v. Nga Po Thet*) and especially the remarks in *Nga San Ya v. Q.-E.*, *ibid.*, p. 463.

(f) L. B. Rulings, p. 63, (*Hamid v. K.-E.*)

Personally we confess to much sympathy with these wrong attempts to secure a right object, but the authors of them failed to see that the fault was really in the interpretation of 'intention' given by Mr. Mayne and similar writers, and later judges acting still under their baneful influence employed their legal logic to overrule the earlier decisions, and so have produced the present state of contradiction in the law, which is little short of a scandal.

The doctrine inconsistent with the language of the law. 9. Next it will be shown from the language of the law itself, that it is not altogether consistent with this doctrine.

The following is the illustration to s. 113 of the Indian Penal Code relating to abetment :—“ *A* instigates *B* to cause grievous hurt to *Z*. *B* in consequence of the instigation causes grievous hurt to *Z*. *Z* dies in consequence. Here if *A* knew that the grievous hurt abetted was likely to cause death, *A* is liable to be punished with the punishment provided for murder.”

Now, we submit that according to the doctrine we are attacking, the illustration ought to have run : ‘ Here, if death was a likely result of the grievous hurt abetted, &c.,’ without any reference to *A*’s knowledge on the point, whereas it specially makes *A*’s actual knowledge the test. Mr. Mayne himself seems to have found this rather difficult to reconcile with his view ; for he writes : “ Section 113 may lead to dangerous laxity unless the proper interpretation is put upon the concluding proviso,” he then dogmatically re-asserts his own doctrine as the proper interpretation and continues, “ Take for instance the illustration in the text. If the grievous hurt instigated by *A* were the maiming of *Z*, under the effects of which he died, no court of justice could allow *A* to plead ignorance of this probability as rendering his offence less than murder (Alison’s Crim. L., 3). As Lord Justice Clerk laid down the law in one case in Scotland (Alison’s Crim. L., 4) :—‘ this was an instance of absolute recklessness and utter indifference about the life of the sufferer ; and the law knows no difference between the guilt of such a case and that of an intention to destroy.’ ”(a) We are there concerned with the definition of murder in English law, though the pronouncement in question seems sufficiently remarkable even as an interpretation

---

(a) Mayne, Commentaries on the Indian Penal Code, pp. 112-3.



of ' malice aforethought,' but we can see nothing in the Indian Criminal Law to prevent *A* pleading what Mr. Mayne's doctrine will not allow him to do, and we therefore say that the doctrine is inconsistent with the law.

But further, if as a fact knowledge is equal to intention, or even if it is to be taken to be so in law regardless of facts, it appears to us that the Legislature must be held to make use persistently of otiose and superfluous expressions.

Take first, *e.g.*, the definition of culpable homicide, s. 299, Indian Penal Code : " Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Now, if the doctrine that a man must be taken to know the natural results of his acts, and if he knows them he must be presumed to have intended them, is correct, the words in the above definition " with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or " are mere surplusage ; for had the definition run " whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide " it would, according to the interpretation of the doctrine, have also included the other cases mentioned in the definition. Indeed, it was unnecessary to have enacted even so much as this, for, without in the least straining the doctrine in question, it would have attained exactly the same results if the section had simply said " Whoever causes death by an act likely to cause death, commits the offence of culpable homicide." The reasoning is certain and automatic and we can exemplify in a few words : the act was likely to cause death, hence death was the natural and probable result : everyone is presumed to know the natural and probable results of his act, and if to know them therefore to intend them : the accused therefore intended them, and *hey presto* the trick is done and the man guilty of murder ! Could anyone desire greater simplicity than this in our law ? But the use in the definition of the expression ' or ' twice over indicates that the legislature intended to distinguish between the three cases there described, and therefore it must have intended

to distinguish 'knowledge' from 'intention,' and not to regard them as the same thing, as the lawyer's presumption does.

Similarly, with the definition of defamation in the same code, "Whoever by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe, that such imputation will harm the reputation of such person, &c.," and again with the definition of 'voluntarily' s. 39, Indian Penal Code, where the same expressions are used. In both these cases if knowledge and intention were for law the same thing, it would be unnecessary to include expressly both kinds of mental states in the definition.

It might also be added that, if the theory were really correct and consistently applied, it would be equally unnecessary to have a special section (s. 86, Indian Penal Code) providing that "a person who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated." For clearly if intention is to be judged by results, as the doctrine holds, and every one is to be presumed to know and therefore to intend the natural and probable results of his act, why is it more difficult to presume this in the case of a drunken than of a sober man? For the doctrine plainly teaches that it is immaterial what the individual's actual knowledge is, and to use Mr. Mayne's own words: "The law assumes that a man knows and contemplates the natural result of his acts, and will not permit him to escape the consequence of his acts by merely pleading ignorance." (a)

Either then the doctrine is not of general application, as the lawyers assume, or else, if it is, the law abounds with otiose expressions, and further the Legislature has accomplished at least one work of supererogation in framing a section to provide for knowledge in intoxicated persons. Thus this master-presumption appears to have overreached itself and clashed with the law it affects to interpret.

---

(a) Mayne, *op. cit.*, p. 112.



## CHAPTER IV.

### INTENTION—(Contd.)

SIR JAMES STEPHEN'S use of the terms 'will' and 'intention' criticised—Examples of Intention in a murder case as presumed under the doctrine discussed in the last chapter—Example of the result in a kidnapping case of presuming that a man must intend the legal consequences of his act—Importation of intention into cases where it is really absent—Intention in estoppel—Negligence and intention—meaning of 'Wilfully'—Intention in fraud—Intention in cases of merger—Use of motive in law—Motive and consideration—Motive and Intention—Motive and Cause—Will in voluntary confessions—Consent—Meaning of 'forcing the will'—Criterion of 'voluntary decision'—Intention in the English law of libel—Various meanings of 'malice' and resulting confusion—Intention in the Indian Law of Defamation—'Implied intention,' 'express intention' and 'primary intention'—Similar confusion caused by such expressions which are in fact reproductions of the doctrine of malice in English law.

#### 1. IN his general view of the Criminal Law of England Sir

Sir James  
Stephen's use of the  
terms 'will' and  
'intention.'

James Stephen has distinguished at some length certain psychological states, including Will and Intention, in a manner which appears to us to call for some remark. We have only space here to quote some of his statements, and must refer

the reader for his whole discussion of the subject to chapter III of the above mentioned work.

"The sensations," he says, 'which accompany every action and distinguish it from a mere occurrence are intention and will. The first step towards an action is, that, to use a common and expressive phrase, it occurs 'to the mind.' A mental image more or less definite of the thing to be done is formed by the imagination. The next step is deliberation, whether or not the thing shall be done and this terminates in a mental crisis, which constitutes the resolution to do it. The next step after resolving upon the act is the selection of means for its execution, and during the whole period over which this preparation extends the person is said to intend to do the act. This original metaphor which suggested the word is, like all such metaphors, most expressive. Intention is 'stretching

towards 'fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes. When at last the opportunity arrives, a second crisis or spasm takes place. The man wishes in that peculiar way which is called willing, and thereupon the different members of his body go through certain motions. What the nature of this crisis is, how such a wish differs generically from other wishes, why it instantly fulfils itself, are questions which have never been answered; but about the fact there can be no doubt. Every human creature attaches to the words 'to will,' or their equivalents, as vivid a meaning as every man with eyes attaches to the words 'to see.' To will is to go through that inward state which as experience informs us, is always succeeded by motion, whilst the body is in its normal condition.'"(a)

Of course no psychologist would speak of intention and will as *sensations* which accompany action, but we are not here concerned with criticising the terminology employed: the passage is quoted because it gives the view of a well-known lawyer as to what is the state of mind in which intention consists, and the description here given appears to us to bear out the contention to be found in these pages,(b) that there is a difference between the actual and the implicit which cannot be ignored. If intention and will really involve a process of the kind pictured by Sir James Stephen, and as a general description of action we do not challenge it here, it seems to us clear that no one who seeks the truth will consent to identify such a process with the state of mind that co-exists with actions of the instinctive impulsive kind; nor will he any longer accede to the legal proposition that the question of intention is merely the question of the implicit knowledge of the individual to be inferred from the results of his acts.

When, however, our author goes on to speak of the relation of intention to will, we are unable to accept several of his statements. Intention, he says, is that which combines and co-ordinates the bodily motions towards one common end, the contemplation by the mind of one common result towards which they are all directed; he then continues: "an action therefore may be said to consist

---

(a) Stephen, *General View of the Criminal Law of England*, Ed. 1863, pp. 76-7.

(b) See pp. 106, 212.



of occurrence to the mind, deliberation, resolution, intention, will and execution by—or if the expression be allowed translation into—a set of bodily motions co-ordinated towards the object intended. This process, and every step in it, may be compressed into an infinitesimally small space of time, or extended over many years, and all the stages run into each other, for a man may be irresolute even while he is executing his purpose, and he must continue to intend whilst he wills it ; but in order that there may be any action at all, the will which causes, and the intention which co-ordinates bodily motion must always be present. The absence of both or either would prevent the action from taking place at all, or reduce it from an action to a mere occurrence, and in either case there would be no crime.

“ In order to illustrate this, cases may be put to show the effect of the absence of both or either. *First*, will and intention may both be absent. A man in a convulsive fit strikes another and kills him. He has committed no crime because he has done no act. He has been acted upon. . . . *Secondly*, will may exist without intention. This case is best illustrated by the motions of an infant. A new-born child moves its hands and arms and lays hold of anything put between its fingers. Every analogy leads us to believe **that** these motions are voluntary, that they are preceded by an exertion of the will generically similar to exertions of the will in adults ; but the co-ordination of such motions towards an object specifically contemplated is a habit which children learn by degrees, and do not thoroughly master for several years. Probably somnambulism and other movements during sleep are of the same kind. They are voluntary ; but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention. . . . *Thirdly*, intention may exist without will. This happens in the common case of a person who lays aside a plan which he has formed. Here there is obviously no action ; but it is conceivable, though scarcely possible, that the event intended might occur without an act of the will, in which case there would be no crime. In order that this might happen, the bodily motion necessary to bring about the purpose intended must be caused by some other means than an act of will. . . . The result of the whole is that an action

consists of voluntary bodily motions combined by the mind towards a common object. Intention is in every case essential to crime, because it is essential to action, and every crime is an action, as appears from the use of active verbs in every indictment.”(a)

2. It appears to us that a view according to which will is merely superadded as the last stage of a process throughout which intention is present is incorrect: we agree that when action follows the presentation of the idea to the self, at that stage it may be said there is an act of will, but the process of willing, though incomplete until then, is present throughout. It starts with the presentation of the idea to the self, or, to use another term, its occurrence in consciousness, and it is completed when that idea is translated into action: it is in fact, in its early stage, identical with intention and only becomes differentiated from the latter by its emotional element and the fact that it passes into action, whereas we may have mere intentions which are never carried out. In the present passage however intention has been unduly exalted into what should more properly be described as Resolve or Aim, which is not co-extensive with every intention but only with those intentions which are reached as the result of deliberation and choice, and are thus transformed in a higher stage: whereas will is practically identified with mere impulse, which is only a part of it, and the presence of idea in will is entirely ignored.

It is not within the scope of this work to discuss the possibility of inter-action between body and mind, but we must maintain that to speak of will as the cause of bodily action and contrast it with intention as something entirely apart from will, will being apparently the instrument by which intention directs bodily action, is both psychologically false and an unnecessary supposition.

We do not object to the statement that will and intention may both be absent when, what Sir James Stephen here designates as an ‘occurrence’ takes place, but we must deny that will may exist

Will does not exist without intention.

(a) Stephen, General View of the Criminal Law of England, Ed. 1863, pp. 78—81.

without intention. The motions of an infant in so far as destitute of intention are in our opinion equally destitute of will, and it is simply because they can be described as 'voluntary' in the sense of being unconstrained that our author's assertion to the contrary appears to have any plausibility.

<p>Will in new-born children.</p>	<p>It is not true that the new-born child displays 'will' in even a rudimentary sense of that term as it is usually employed: such movements are far more truly described as reflex or mere re-actions to sense stimuli.</p>
-----------------------------------	--

"Distinct grasping movements," says Wundt, "develop gradually from the aimless movements that are observed even in the first days but do not, as a rule, become certain and consciously purposive until aided by visual perceptions, after the twelfth week. The turning of the eye toward a source of light, which is generally observed very early, is to be regarded as reflex. The gradual co-ordination of ocular movements is the result of these reflex adjustments . . . . . the whole development is a gradual continuous process, and is from the first inter-connected with its original physiological substratum." (a) Further, speaking of the development of the will, the same author says that, though many animals execute immediately after birth fairly perfect impulsive movements, owing to their possession of inherited reflex mechanism of a complex character, the new-born child does not show any traces of such impulsive acts. It merely shows the earliest beginnings of simple volitional acts of an impulsive character, which result from the reflexes caused by sensations of hunger and by the sense of perceptions connected with appeasing hunger. The primitive volitional acts grow out of these reflexes. He estimates that the first indications of a simple volitional process made up of motive, decision and act do not appear until the twelfth or fourteenth week, while complex volitional acts developing from these simple ones are not observed until the beginning of the second half of the first year. (b)

---

(a) Wundt, *Outlines of Psychology*, p. 318.

(b) *Ibid.*, p. 322-3.



Now by 'simple volitional acts' Wundt does not mean the same as 'voluntary acts' as has been already explained(*a*), and we cannot therefore allow the presence of will in the new-born child.

The instances of somnambulism and other movements during sleep next cited are not naturally explained in such a manner. In sleep a certain idea gets a predominance in the mind owing to the absence of the usual inhibitory influences, and then translates itself into action according to the recognised ideo-motor tendency. It is true that in normal cases of will the voluntary decision similarly gives the predominance to the representation of the act decided on as against the representations of alternative courses : after the conflict of ideas, with the decision comes the belief that one of the ideas is to be carried out to the exclusion of the others, and this belief gives to the idea of the action the predominance leading to its execution.*(b)* In the case of movements during sleep there is no contest of ideas as the result of which one gets the predominance but, owing to the fact that the higher centres are cut off and the critical faculty absent, the idea which suggests itself has full sway without any dispute. But the resulting action is quite different from one that is the outcome of an act of will. Indeed Dr. Barth defined somnambulism as 'a dream with exaltation of the memory and automatic action of the nervous centres, without voluntary and conscious control' and characterised the somnambulist as 'a living automaton in whom conscious will is for the time being destroyed.'*(c)*

As to actual cases of sleep-walking the most that can be said is that whereas in ordinary sleep and dreams excitability is limited entirely to the *sensory* functions and external volitional activity is *completely* inhibited, in somnambulism the fanciful ideas of dreams are connected with corresponding volitional acts and the will is not completely inhibited.*(d)*

It seems, however, certainly incorrect to say that these movements are not co-ordinated with a view to any definite result : the

---

(*a*) See pp. 89, 90, *et seq.*

(*b*) Cf. Stout, *Manual of Psychology*, p. 619.

(*c*) Du Sommeil non naturel, Paris, 1886.

(*d*) Wundt, *Outlines of Psychology*, p. 303—5.

state of somnambulism is similar to that of hypnosis in so far as the attention is concentrated on one thing, generally the command of the hypnotizer, and this concentration is one of the essential features. The fact that the idea on which the movements follow is suggested from outside or arises in the mind of the sleeper from unexplained or unusual sensations, does not warrant the inference that the movements are not due to an idea at all but are entirely automatic or uncontrolled.

How far it is true that we may have intention without will, has been already discussed<sup>(a)</sup>: the cases, however, in which it is allowed that this may be so, have no similarity to the one here suggested, *viz.*, that of laying aside a plan which a man has formed. It seems to us clear that in such a case we have the very result described a few lines above as voluntary decision in which after ideally representing alternative courses one idea is eventually carried out to the exclusion of the other: we are simply at a loss to understand on what grounds the presence of will can here be denied.

Nor does the other instance imagined for the sake of illustration appear to us to help his theory. “Suppose a man,” he says, “having resolved to push a man over a cliff, and having approached him for that purpose, were to be seized with a convulsive fit by which his arm received the very impulse it could otherwise have received from his own will. This would be a case of intention without will.” Obviously there is no intention present in the man’s mind at the time the convulsive fit is on him, whatever there may have been just previous to the fit, and such a case is in fact the very one which is given by our author on the preceding page as an instance in which both will and intention are absent, and which we quoted above. If, however, under such circumstances the presence of intention can be imagined, it would be equally easy to allow the presence of will; and, in fact, it would appear to us that it would then be impossible to say that the action was not the result of will rather than of the reflex or other movements which constituted the convulsive fit, unless the influence of ideas on action be altogether neglected.

External action not  
necessary to will.

---

(a) See pp. 93, 94.

The explanation of our author's view appears to be that he considers external action to be necessary to will, and therefore he does not admit an act of will in the case, *e.g.*, of the man who lays aside a plan. But this attitude has no justification, and we may quote concerning it the words of Wundt: "External acts of will are the only ones in the whole sphere of volitional processes that force themselves emphatically on the attention of the observer. As a result the tendency was to limit the concept will to external volitional acts, and thus not only to neglect entirely the whole sphere so important for the higher development of will, namely, internal volitional acts, but also to pay very little attention to the components of the volition which are antecedent to the external acts, or at most to pay attention only to the most striking ideational components of the motive." (a) This truth accounts partly for the favourite method among the lawyers of trying to discover intention by regarding exclusively the external act and its results and neglecting entirely the antecedent mental state.

3. Some further examples of Intention

Further examples of intention. will now be given, and also instances of the use of will, motive, &c.

In the case of *Shwe Hla U. v. King-Emperor* (b) the accused in a scuffle, brought about immediately by provocative words used by the deceased, struck the latter two blows on the head with a pint bottle of brandy. Deceased fell at the second blow, and remained unconscious till his death, thirteen hours afterwards. It was held that the repetition of the blow brought the case within the third clause of s. 300, Indian Penal Code, the learned Judge arguing as follows:—'The act of the accused must be judged by the light of the common knowledge of mankind upon the dangers and results of striking a person on the head.' 'Ignorance of the actual causes which may bring about another's death in consequence of a blow cannot affect the question of the striker's knowledge and intention when striking the blow. If actual knowledge and experience do not do so, instinct at least tells every man that to hit another human being any violent blow on the head may possibly re-

(a) Wundt, *Outlines of Psychology*, p. 211.

(b) *Lower Burma Rulings*, p. 125.



sult, or is likely to result, or will probably result in serious injury to the person struck, but knowledge, belief or expectation of the amount of injury that may be caused must depend on what is used in inflicting the blow, and the force with which the blow is delivered. A man is presumed by law to intend the ordinary and natural as well as the necessary consequences of his acts.' Then we have Mr. Mayne's dictum quoted that 'the question of intention is in the majority of cases merely the question of knowledge,' and further enlarged on. It is then remarked that 'in the case of a blow with a bottle full of liquid, there is no common experience or knowledge to tell a man what the probable result of a blow on the head with such a thing will be,' and that 'although the blows in the case were given during the course of a drunken brawl, the acts of the accused have to be considered as if they were the acts of a thinking and reasoning man.' Then the following conclusion is drawn: that in the case of death caused by a single blow with a bottle it could only be imputed to the striker that he must have known that he was likely to cause death or injury sufficient in the ordinary course of nature to cause death, but as the accused struck a second blow, 'at the time he dealt that, he must be taken to have known that he was using a breakable but yet a hard thing which had withstood one violent blow on his opponent's head, and consequently there was reason for his believing that the bottle would probably withstand another. Every man must be taken to know that if he repeats violent blows with anything substantial and hard on another man's head, he will probably either kill the man, or cause him such injury, as is sufficient in the ordinary course of nature to cause death.' Owing to the repetition of the blow it was therefore held to be murder.

We have selected this case as a particularly bad instance of blindly following Mr. Mayne's dictum, and so arriving at results which appear to us to be purely imaginary and utterly unlike what was probably the real state of the accused's mind at the time. An angry man in the accused's position,—omitting all consideration of the fact that it was a drunken brawl, would have acted on instinctive impulse in the way described in the preceding chapter, and his mind would have been very much in a blind or blank state, contain-

ing at the most a general idea of striking (a) : all that he was taken by the learned judge to know at the time he dealt the second blow, viz., that he was using a breakable but hard thing, &c., &c., &c., &c. (see above) was therefore simply a fancy picture and to attribute this stream of ideas to him between the striking of the first and second blow, apart altogether from the question of the rate of mental pace, appears to us to be little short of a *reductio ad absurdum* of the theory that knowledge equals intention, and that a man must be taken to contemplate the natural results of his acts.

There is also another objection to the method. The judge appears to consider that it is sufficient for an idea to be true and clearly conceived to make it an incentive to action, hence if he can attribute the ideas described above to the accused and justify them as being the ideas which others hold, he thinks he has done all that is required. He never seems to suspect that an idea can only supplant a feeling on condition of becoming a feeling itself, and it is idle otherwise to assert that such ideas ought to have restrained the man from his act. "The intellect," says Ribot, "is capable of instantaneously finding out a new truth, or recognising an idea as just and conformable to the nature of things ; but all this remains in a theoretic condition, i.e., without emotional colouring or tendency to realise itself. That which is discovered so rapidly by means of logic takes years or even centuries to become a motive for action." (b)

But further let us consider how he was assumed to be in possession of such knowledge : twice over the judge enumerates as his sources of knowledge, the ordinary knowledge and experience of mankind and instinct, but he expressly says that there is no common knowledge or experience to tell a man what the probable result of a blow on the head with a bottle would be. It can hardly be assumed that while there is no such ordinary knowledge or experience as to the effect of one blow there is as to the effect of two blows from a bottle, at least we do not see on what possible grounds such a statement could be made ; it therefore seems to follow that

---

(a) See para. (1) of the last chapter, under the heading 'The Idea in Will and Impulse' and para. (3) under the heading 'Two classes of actions,' and para. (4) *ad fin.* 'State of mind in anger.'

(b) Ribot, *Psychology of the Emotions*, p. 192.



in this case instinct was the source of the knowledge. Now we should in any case like to ask the learned judge what he means by this term 'instinct', as it seems to us impossible to make instinct equivalent to reason, as he appears to desire to do. Instinct though purposive is involuntary and cannot be explained either in terms of conscious reflection or from individual associations<sup>(a)</sup> and there is in it an instantaneous transition from excitation to movement with no interval.<sup>(b)</sup> The very essence of instinct is that it is unreasoning, and unless therefore it is identified with experience, from which it is expressly dissociated here by the judge, it can tell us nothing, though it may drive us to blind action. To make it equivalent to either knowledge or intention as the learned judge seems to do is mere error, but unfortunately with disastrous results to the accused; but we object strongly to the use of the term here and regard it as a mischievous word because it tacitly professes to make allowances for unskilled people and ignorant races, whereas it has really been employed to mean something quite different from any acceptation of it that we know of. A slight knowledge of psychology would have prevented this mistake.

4. The form in which the doctrine is sometimes expressed is that "a person is presumed to intend the natural and *legal* consequences of his acts"<sup>(c)</sup> the presumption of intention following of course, on the principle which is already familiar, from the previous presumption of knowledge. We shall now give an example of what follows from presuming that a man intends the legal consequences of his acts.

Section 366 of the Indian Penal Code creates a more serious offence than s. 363 (which provides for kidnapping from lawful guardianship) and runs as follows:—"Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she

(a) Wundt, *Human and Animal Psychology*, pp. 392—39.

(b) Höfding, *Outlines of Psychology*, p. 92. See also preceding chapter para. (2).

(c) Lawson on *Presumptive Evidence*, Rule 96; Best on *Evidence*, § 336.



will be forced or seduced to illicit intercourse, shall be punished, &c.”

The Special Court of Lower Burma decided in the case of *Q.-E. v. Ne U(a)* that as a Burmese Buddhist girl who is a minor cannot contract a valid marriage without the consent of her guardian, it therefore must necessarily follow that anyone who kidnapped or abducted her must do so in order that she may be forced or seduced to illicit intercourse. It may be explained that frequently young Burmans, when the parents of the girl did not consent to the marriage, would abduct the girl in order to marry her without their consent, and were then prosecuted under s. 366, on the ground that they must be taken to intend the legal consequences of their act, which would be illicit intercourse, such a marriage not being a valid one. This decision was followed in the case of *K.-E. v. Nga Po Saw(b)*, the Judicial Commissioner remarking that the reasoning of the Special Court appeared to him correct. Nevertheless there has always been a feeling that the decision was wrong, and at length it was dissented from in the case of *Crown v. Nga Chan Mya(c)* where the Chief Court held that if a Burmese Buddhist girl under 16 years of age elopes with a lover of her own free will, intending to cohabit with him, the resulting sexual intercourse is not necessarily illicit, and that s. 366 does not apply to a case in which a minor girl, at the time of the kidnapping from lawful guardianship, intends to cohabit of her own free will with the kidnapper.

This, however, has again been dissented from by another Judicial Commissioner of Upper Burma in the case of *K.-E. v. Nga Ni Ta(d)*, who seemed to think that the points to be considered were whether the intention to seduce must be subsequent to the elopement and not previous to it, while the girl was still in the custody of her parents, and whether the mere elopement of the couple constituted marriage if that was the intention of the parties.

That decision in its turn has been yet again dissented from by a later Judicial Commissioner in the case of *Nga Tha Zan v.*

---

(a) Selected Judgments, Lower Burma, p. 202.

(b) Upper Burma Rulings, 1897-1901, p. 328.

(c) Lower Burma Rulings, Vol. I, p. 297.

(d) Upper Burma Rulings, 1903, Penal Code, p. 15.

*K.-E.(a)* on the ground that it depends on when the seduction is effected.

To us it appears that the real point in the case has never yet been brought to light, because of the doctrine that the man who elopes with the girl must be presumed to intend the legal consequences of his act. The reason why it has been felt that the original decision of the Special Court was wrong, is simply because that decision attributed to the accused an intention which was the opposite of that with which he really did the act : for in these cases the accused really does intend a marriage and so also does the girl, and the mere fact that he cannot legally accomplish his intention cannot alter that intention itself. An intention often cannot be carried out or it is attempted to be carried out unsuccessfully, and we may remind the reader that Intention and Resolve are distinguished from Volition by Mr. Bradley expressly on the ground that in them the idea does not actually carry itself out, but we have such things as mere intentions and mere resolves : (b) but the intention is there none the less and it is only because the lawyers will judge of the intention solely by the results or the possible results of the act that they are able to presume that the accused never had such an intention. Surely a method must be held to have broken down when it results in treating a man as guilty of an intention which every one would probably admit he never had when he abducted the girl, which simply flies in the face of the truth, and rests on a double assumption neither of which is to our mind correct. The Judicial Commissioner disputes with two judges of the Chief Court that the test is the real intention of the parties, *i.e.*, as to whether, if the intention is to marry, that in itself would constitute a marriage ; but, apart from the absurdity of attributing to an ignorant Burman accurate knowledge on a point of civil law about which even these authorities cannot agree, that was not the matter to be decided. The test is the real intention of the parties, *viz.*, whether they intended it to be a marriage or not, and, if so, whatever the actual result of their elopement may be, there will be no offence under s. 366, *pace* the legal presumptions of Mr. Mayne or any of the writers on Evidence.

---

(a) *Ibid*, 1905, Penal Code, p. 19.

(b) *Mind* N. S. No. 44, pp. 447-8.



For the question of intention is the question of what determined the action, *i.e.*, the feeling, the motive, the desire of the man but not his knowledge, much less the knowledge attributed to him by legal text-books, as we have pointed out again and again in our last chapter.

5. We had occasion in Chapter II, paragraph 3, to allude to a criticism of the first edition of this work to the effect that half of our criticisms of the legal use of "intention" were due to forgetting what the lawyer had in view. It was said that he was not engaged in a psychological analysis but was thinking of acts which it is useful to attempt to prevent. We replied to this in the passage referred to on the assumption that the critic had correctly stated the lawyer's point of view, though we expressed a doubt whether such was the case. We here give reasons for that doubt because we shall examine shortly the class of cases which we conceive the critic specially had in mind, *e.g.*, cases of estoppel, fraud, libel, etc. If we understand the criticism correctly, it amounts to this, that in some cases the lawyers say that there is intention or a wrong intention in cases in which there really is no intention as ordinarily understood by that word—for, as we have said previously, the psychologist means by intention the same thing as the plain man—and they condemn the act or penalise the party not on account of the intention *pro forma* alleged, but because it is an act of which in the interests of society it is useful to prevent the commission. In other words they take no account of intention, but hold the act itself to be conclusive against the party on account of its results.

Now the question which naturally occurs is this: If the above is true, what is the reason for importing intention at all into the case? It would seem that either it is entirely useless to do so, or, if some use is really made of it, it is admittedly a misleading one. Why should not the act be regarded as an offence or penalised in civil cases as a wrong one simply because of its results, and no mention of intention be made? Our answer to this question is that this fictitious introduction of intention is not otiose but necessary in order to reconcile the community to the justice of the course. We have already shown that

The importation by the law of intention into some cases where admittedly no intention really exists.



law depends for its existence on its correspondence with the moral sentiment of the people, and that any law which is really opposed to this cannot stand. We now go further than this: not merely must it be in accordance with the moral sentiment of the nation, but it must also be in accord with what we may term the current opinion of the times. As soon as it conflicts with this, even though there may be no strong moral sentiment in the matter, there will be an outcry against the law. This some lawyers know: they are aware that the community will not agree to condemn people solely on account of the results of their acts to the extent to which the legal community do as a short cut to their administration of justice. The community have shown this by the language which they use in framing Acts: they insert most careful provisions relating to intention and knowledge in criminal cases, as, for example, throughout the Indian Penal Code, and again in provisions relating to evidence, as in s. 115 of the Indian Evidence Act, concerning estoppel. Men also complain of injustice when they find themselves credited in law with intentions and motives which they never had and which the evidence did not prove. We have quoted elsewhere<sup>(a)</sup> Mr. Houston's complaint about the use made by lawyers of unfounded charges of 'fraud,' such fraud being what the legal profession terms 'constructive fraud.' But this expression does not reconcile the community to its use where no real fraud exists: Mr. Houston writes: "If groundless allegations of fraud are to be permitted with impunity to be introduced into any ordinary commercial action the charge will soon be viewed with indifference and as a matter of course; and this will undoubtedly tend to lower the standard and code of commercial honour."

The introduction therefore of an allegation of intention in these cases is simply to deceive the community, and cause them to believe that justice is being administered in accordance with the spirit of the times, and the community only discover what is the real meaning of intention being 'presumable,' fraud 'constructive' and the like, when someone himself engages in litigation.

---

(a) See Chapter II, last paragraph.

We have said above that some lawyers are aware of this feeling of the community, and we infer this from their own writings. Prof. Dicey has written a book, *Law and Opinion in England*, to exhibit the close dependence of legislation, and even the absence of legislation, upon the varying currents of public opinion. He there says (p. 462):—"He (*i.e.*, the lawyer) will do well to direct attention as far as possible to the close and demonstrable connection during the nineteenth century between the development of English law and certain known currents of opinion. He should insist upon the consideration that the relation between law and opinion has been in England, as elsewhere, extremely complex; that legislative opinion is itself more often the result of facts than of philosophical speculations; and that no facts play a more important part in the creation of opinion than laws themselves. He must above all enforce the conclusion, at which every intelligent student must ultimately arrive, that each kind of opinion entertained by men at a given era is governed by that whole body of beliefs, convictions, sentiments, or assumptions, which for want of a better name, we call the spirit of an age. 'Deeper than opinions lies the sentiment which predetermines opinion. What it is important for us to know with respect to our own age or any age is, not its peculiar opinions, but the complex elements of that moral feeling and character in which, as in their congenial soil, opinions grow.'" (a)

And again: "True indeed it is that the existence and alteration of human institutions must, in a sense, always and everywhere depend upon the beliefs or feelings, or in other words, upon the opinions of the society in which such institutions flourish." (b)

The lawyers then are aware of this connection between law and public opinion and, if they believed that the public had no objection to presuming intention where no intention existed, they would not think it worth while to include lengthy passages on intention in their writings or to maintain that the law does take account of intention in such cases. But this is not the attitude of the more recent writers on law. They either apologise for not considering more fully the state of a party's mind, on the ground

---

(a) I. Pattison *Essays*, II, p. 264, quoted by Prof. Dicey.

(b) Dicey, *O. C.*, p. 1.



that it is impracticable to do so, as did Sir Frederick Pollock in a passage already quoted, (a) or they avowedly attach great importance to intention and argue that the lawyers have regard to it. Thus Sir William Markby first carefully defines 'intention' as the attitude of mind in which the doer of an act adverts to the consequence of the act and desires it to follow: He distinguishes it from 'knowledge,' and blames Austin for not doing so, on the ground that in knowledge there is no desire that the consequence should follow. He points out that there are numberless rights and duties which depend upon the existence of a particular intention or knowledge. He explains that when the law does attach liability in cases in which the person does not expect the consequence to follow, it is on the ground that the doer has arrived at that attitude in a reprehensible manner, whereas had he arrived at that attitude upon reasonable grounds, he would not be liable. He further distinguishes knowledge and intention from rashness and heedlessness with reference to this ground of advertent to consequences and the manner in which such advertence takes place. He asserts that the cases in English law in which the mental state is entirely disregarded are *now* very few, instancing only manslaughter and assault, while "in the Indian Penal Code it would be difficult to find a single offence which is not made to depend on the way in which the consequences of the act presented themselves to the mind of the doer." As regards civil law, he says that the Courts in the present day give themselves the greatest latitude in enquiring into the circumstances under which a deed is executed, so as to ascertain the intention of the parties, and the real nature of the proceeding and concludes: "Indeed so much importance is attached to the mental attitude in modern law, that it would almost seem as if liability could not in many cases be conceived as arising from an act unless either the consequences were adverted to, or the inadvertence were itself reprehensible." (b)

His remarks on rules of construction in law are particularly instructive: "It is the same with what are called rules of con-

---

(a) Chapter I, paragraph 2.

(b) Markby: Elements of Law, pp. 117—120 and 123.



struction; by which I mean those rules which have been laid down for determining what inference is to be drawn as to intention from express manifestation of it. These rules like the rules of evidence just now referred to, are artificial, and there is no doubt that it is possible, by the application of such artificial rules, to miss the real intention. It is, however, supposed that by the application of these rules, the intention is in the general run of cases better ascertained than in any other way. The supposition may or may not be correct, but there is no doubt whatever that, whether the rules are efficacious or not, the legal result is still connected with the intention. Thus, we constantly hear Judges lamenting the result to which some established rule of construction drives them, because they think that this result was not intended. But the intention which is thus presumed is always treated as a real intention. If there has been fraud or undue influence, or the party using the expressions under consideration is insane, the result is modified accordingly. *We never now go back to the view of earlier times and say that the act alone is conclusive.*”(a) Again: “Law sometimes imputes intention or knowledge which had no existence to the doer of an act. This is when by reason of error there was no such intention or knowledge. . . . In criminal cases we hardly ever impute intention or knowledge at all, the direct infliction of punishment being reserved for real and not imaginary offences. In transactions between man and man we very often do impute intention, but, as I shall show hereafter, mostly by reason of the assumption that the expressed intention and the real intention actually correspond. This undoubtedly in many cases leads to the imputation of an unreal intention, but one of a very special kind. The assumption that the expressed intention and the real intention necessarily agree is justified by our experience that upon the whole this assumption is a useful one.”(b)

We submit that these passages contradict the view that the lawyers neglect intention and condemn acts without reference to it on the mere ground that it is useful to attempt to prevent such acts a view which is discarded as “the view of earlier times” to which

---

(a) Markby : Elements of Law, pp. 127-8.

(b) *Ibid*, pp. 138-9.

the lawyers “never now go back.” It seems to us quite plain that, whatever success they may have, the lawyers of to-day do profess to consider and attach importance to the question of intention alike in civil and criminal law. What is surprising is that, seeing as they now do, that owing to popular sentiment you must really show intention before you punish or penalise, they are nevertheless content to remain at a stage in which they admit that they merely assume that they have got the right intention, and say practically that it does not matter if the wrong intention is treated as the right one. It is, however, satisfactory that one writer should have confessed so candidly the artificial manner in which the law here sets about its task.

6. Intention in estoppel will be the next subject of consideration. The following is the section relating to it in the Indian Evidence Act (s. 115) :—“When one person has by his declaration, act or omission, *intentionally* caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. *Illustration.*—*A* intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it, &c.”

Let us compare with this some of the utterances of the commentators. “As it is immaterial in what form the representation is made, so it be a representation, so also is it immaterial to know what the motive or the state of knowledge is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.”(a)

Now, however you may twist the words of the section you cannot get away from the fact that not only has the person deceived to act upon the representation, but the person making it has also to *intend* to cause or permit the other party to believe it and to act on it : if therefore the question of intention is the question of know-

---

(a) Ameer Ali and Woodroffe, 5th Edn., Indian Evidence Act, p. 757.



ledge, as Mr. Mayne holds, so far from it being immaterial to know the state of knowledge of the party making the representation, it is highly important to know it in order to show his intention. We do not ourselves think the view of the commentators to be right, but such as it is, we would point out that it is inconsistent with the "knowledge equals intention" theory.

The next utterance is, however, still more explicit for it actually includes 'intention' in what is immaterial. "Assuming that there has been a representation in the sense mentioned and that that representation is clear and unambiguous, and the other party has been induced to act thereby, it is immaterial what the intention, motive or state of knowledge of the party making the representation was. But though the intention is immaterial so far as the creation of the estoppel is concerned, representations may be, and have been, classified with reference to the intention with which they may be made. A person may be estopped, if he has made either a fraudulent misrepresentation, or made a false statement without fraud but negligently, or has made a false representation without fraud or negligence." (a)

This passage merits attention : the first part of it is simply directly opposed to s. 115 and shelves intention altogether. The middle part of it shows a disposition to hedge, but the third part gathers boldness and goes even beyond the first part, laying down that a man creates an estoppel if he makes a false statement 'negligently,' i.e., *without* the intention of doing so. For the meaning of negligence is nothing more nor less than the *absence* of intention, as these very commentators themselves state in the following words :— "It must however be remembered that probable consequences may result from acts as to which the law, *by pronouncing them to be negligent, expressly negatives intent* ; and it would be repugnant to justice that one should be conclusively presumed to intend the consequences of his accidental or unavoidable acts." (b)

We can heartily agree with this last clause, it is part of what we have been contending for in the preceding chapter, and we would ask the reader to apply it when he is told that intention must be

---

(a) Ameer Ali and Woodroffe, O. C., p. 765.

(b) *Ibid.*, p. 732.



judged by the results of an act and that every one must be presumed to intend the natural and probable results of his acts.

In view of the above quotation it is somewhat perplexing to find these commentators elsewhere holding that “ at the same time a party by negligence in asserting a claim may be afterwards estopped from setting up such claim against strangers,” (a) and again “ Negligence when naturally and directly tending to *indicate intention* will therefore have the same effect in creating the estoppel as actual intention.” (b) That is to say that the absence of intention indicates intention : there are some who will assert that black is white, there are others who will believe it if stated by persons of sufficient authority, we must decline either to take this leap or follow any one else who does so.

We must pause however and point out how this legal somersault has come to be performed : this also must be laid to the charge of our legal presumptions and the lawyers’ ignorance of psychology. For they have introduced a doctrine that intention “ may be ‘ presumable ’ as well as ‘ actual,’ so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result,” (c) and this has been reduced to two recognised propositions in the following terms :—“(3) And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were represented. (4) There is yet another proposition as to estoppel. If, in the transaction itself which is in dispute one has led another into belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against

---

(a) Ameer Ali and Woodroffe, O. C., p. 777.

(b) *Ibid*, p. 778.

(c) *Ibid*, p. 778.

the first to show that the state of facts referred to did not exist.”(a)

This simply makes a reasonable man’s inference and not the actor’s intention the test of the estoppel to the complete disregard of the words of the law, and as regards the two propositions quoted, the first gratuitously drags in the reasonable or normal man, as to the difficulties of which test the reader is referred to our chapter on the Theory of the Normal Man ; the second similarly introduces all the difficulties of the meaning of ‘ proximate cause ’ which are discussed in our chapter on Causation.

It is not surprising to find, that though the first proposition was adopted in Indian law in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*, in another case (*Syed Nurul Hossein v. Sheo Sahai*) where the facts were similar there was held to be no estoppel.(b)

Psychology, however, teaches that intention has nothing to do with other persons’ inferences from conduct, and we need not here repeat in what it does consist : its opposition to the legal point of view may be enforced by a quotation from another author :—  
“ It is always in short the apparent, not necessarily the real intention of a promisor by which he is bound. The law looks as regards intention and most wisely, to the natural result of a man’s acts and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend.”(c) This is an explicit declaration that the law does not look to the real intention. The same writer with equal candour further avows that it is the office of the Court to assume as the true intention of the party something which is not so : “ It was once even supposed,” says Sir Frederick Pollock, “ that parties could not make time of the essence of the contract by express agreement ; but it is now perfectly settled that they can, the question being always what was their true intention, or rather what must be judicially assumed to have been their intention.”(d)

---

(a) *Carr v. L. and N. W. R. Co.*, L. R., 10 C. P., 307 (1875), quoted pp. 765-6, Ameer Ali and Woodroffe.

(b) Ameer Ali and Woodroffe, 5th Ed., Indian Evidence Act, p. 766, Note 1.

(c) Dr. Rashbehary Ghose, *The Law of Mortgage in India*, 3rd Ed., p. 500, quoting Sir F. Pollock in 10 L. Q. R., p. 8.

(d) Pollock, *Principles of Contract*, p. 505.

Will any one longer contend that the legal doctrine of intention deals with realities and is not a fiction and a sham ?

Perhaps an even more open assertion that in estoppel 'intention' is not to be understood in any intelligible sense of the verb to intend is the following : " It is not necessary in order to raise an estoppel to prove that the person against whom it is to be used had any intention to mislead or deceive "(a), or again, " According to section 115 of the Evidence Act, the one person must intentionally by his act or declaration have caused or permitted another person to believe a thing to be true and to act upon that belief. That, however, does not mean that he must have intended to mislead. It is not so much his motive or intention as the effect which his representation as to an existing fact is likely to have on others, that has to be regarded ; for, if it was such as to gain credit with a reasonable person and induce the belief that it was intended to be acted upon, then a case of estoppel arises." (b) One is tempted to say to these lawyers " verily by your traditions ye make the word of the law of none effect."

7. If the commentators were unfortunate in their explanation of 'negligently,' they have hardly been less so in the way they have treated 'wilfully.' 'Wilfully' in estoppel. The word bears on its face the etymological meaning of 'will,' as is recognised, *e.g.*, in the following attempt to define 'wilful default' : " wilful implies nothing blameable, but merely that the person of whose action the expression is used is a free agent, and that what has been done, arises from the spontaneous action of his will." (c) It therefore implies an act of will, the psychological explanation of which has been given in the preceding chapter. (d)

Best after quoting the doctrine of estoppel as follows : " where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, &c." (e) adds " by 'wilfully' in this rule must be understood

(a) Cunningham and Shephard's 9th Ed. of the Indian Contract Act, p. 82.

(b) *Ibid.*, p. 461.

(c) Dr. Rashbehary Ghose, *op. cit.*, 623-4.

(d) See preceding chapter, para. (1) especially, and *passim*.

(e) Best on Evidence, § 543; Cf. also Pollock, Principles of Contract, pp.



not that the party represents that to be true which he knows to be untrue but only that he *means* his representation to be acted upon, and that it is acted upon accordingly. For if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take his representation to be true, and believe that it was meant that he should act upon it. . . . the party making the representation will be equally precluded from contesting its truth."

If by 'means' his representation to be acted upon, the author does not mean 'intends' it to be acted on, we cannot conjecture what he does mean: while if that is his meaning, then he goes on to repeat the same assertion that we have already criticised, that the man's real intention is immaterial and other people's inferences are the criterion. The substitution of 'wilfully' for 'intentionally' however does not improve matters, as it is a stronger expression implying that the agent's self is carried out into the act in a higher degree, and therefore it makes it more difficult to neglect it altogether and substitute the reasonable man's expectation for it. It further makes one more word of the English language rendered unintelligible by law.

'Wilfully,' however, is elsewhere said to be in effect equivalent to 'intentionally' or 'voluntarily,'<sup>(a)</sup> and it would naturally follow from this that it was opposed to 'unintentionally,' a conclusion which however seems to have alarmed Parke, B., in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*. An effort was made by the Madras High Court in *Vishnu v. Krishnan*<sup>(b)</sup> to make a distinction between 'intentionally' and 'wilfully,' and to hold that it was intended to exclude cases from the rule in India to which it might be applied in English law, but the Privy Council overruled this in the case quoted a few lines above. The result therefore seems to be that both expressions are to be identified in law and given a significance which they bear nowhere else, that we know of, and which is opposed to their psychological meaning: and yet Sir Frederick Pollock says "Even if the terms were used by lawyers in a peculiar sense, there would be no need for apology; *but the legal sense is the natural one.*"<sup>(c)</sup>

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 777, note 8, and p. 778, note 1.

(b) I. L. R., 7 Mad., 3, 8 (1883).

(c) Pollock on Torts, p. 421.

" The meaning of 'intention' has been similarly twisted in cases of actual fraud; a single instance will suffice. " Misrepresentation, (otherwise called *Suggestio Falsi*) " says Snell, " is where a party intentionally misrepresents a material fact, and so produces a false impression " (a) and then on the same page " And misrepresentations will amount to fraud, not only where they are known to be false by those who make them, but also (at least for some purposes) where they are made by persons who do not know them to be true or false and yet make them or *who believe them to be true*, when in the due discharge of their duty, they ought to have known (and ought to have remembered) the fact which negatives their truth."

Thus a person who makes a representation believing it to be true is held by law to misrepresent intentionally on the ground that someone else thinks they ought to have known, and apparently, according to such a doctrine, anyone is at the mercy of anyone else's view and the last thing to be considered in order to attribute intention to a man, is what he himself thought. Could anything be more preposterous or a greater inversion of fact than this ?

No attempt is here made to define 'ought' or to explain how it is to be applied to memory where it is merely a question of fact, for though you may aid you cannot force a memory, and it seems that 'intention' is also to be presumed to exist in the absence of knowledge though elsewhere intention and knowledge are held to be the same thing. Such contradictions would, of course, be impossible, if it were not for the legal presumptions employed.

It is not surprising in view of such teaching to find Sir William Markby plaintively saying " I understand falsehood to be the moral characteristic which after much debate, has been decided to be necessary in order to constitute liability for fraud. Nevertheless, say the books, to constitute fraud it is not necessary to show that the parties making the assertion knew it to be untrue; it is enough that the person making it did not believe it to be true." He adds that it is difficult to understand a distinction founded on the difference between knowledge and belief: for assertions assumed to be true on insufficient grounds or without any consideration can hardly be

---

(a) Snell, *Principles of Equity*, 13th Edn., p. 468, quoting *Hill v. Lane*, L. R., 11 Eq., 215.

called false or mendacious.(a) It appears to us, however, that the lawyers will find no difficulty about making such an assertion when they will state that a person who says a thing believing it to be true intentionally misrepresents and is guilty of fraud.

There is an interesting discussion on the law of merger, (b) the question being whether in certain cases reviewed, it was the intention of the party paying off the charge to keep it alive or not. The matter seems now settled for India by the concluding words of s. 101 of the Transfer of Property Act which provide that the charge is not extinguished when its continuance is for the party's benefit, yet nevertheless judges have still spoken of the question of intention.(c)

It will be seen that the difficulties in these cases arose from identifying intention with knowledge : thus the Madras High Court in the case of *Shan Maun Mull v. Madras Building Co.*,(d) were perplexed by the argument that an intention to keep alive an earlier security cannot be presumed, except where the person entitled to it has notice of later incumbrances, and that at any rate, it would not subsist if the deed of conveyance purposed to extinguish it, and they tried to limit the words 'or such continuance would be for his benefit' in s. 101, Transfer of Property Act, to the time when the conveyance was executed. A similar view was taken by the Bombay Court in *Bapu v. Mahadaji* (e) where the circumstances from which an intention could be presumed really means the state of the man's knowledge at the time. But clearly in such cases the natural results of the man's act and the knowledge of it at the time are not the measure of his intention, for often the person paying off the charge is ignorant of what will subsequently result, and yet he must be presumed to have acted with the intention of providing against what he did not know and did not expect would happen, what was in fact not the natural or probable result of his conduct if he allowed the charge to be extinguished.

---

(a) Elements of Law, pp. 337-8.

(b) Dr. Rashbehary Ghose, *op. cit.*, pp. 561-575.

(c) *Ibid*, p. 573, *et seq.*

(d) 15 Mad., 268, 280.

(e) 18 Bom., 348.



Use of motive in  
law.

8. Motive was defined in paragraph 3 of the preceding chapter and we shall here examine some uses of it in law.

Motive and consi-  
deration.

First we propose to try and distinguish motive from "consideration," which appears to be a semi-psychological term of which the exact purport is anything but clear. Sir William Markby says that "a contract is made upon consideration when something is done, forborne, suffered or undertaken by one party at the request of another, which is made the foundation of the promise of that other," but he evidently regards the application of the notion as most unsatisfactory. Not merely does he give instances of the injustice sometimes caused by the doctrine that a contract not founded upon consideration will not be enforced and that the Court will not look to the adequacy of the consideration, but he speaks of the attempts of the judges to make out a consideration where none existed, and the almost unintelligible reasons sometimes assigned for their decision. He concludes that it is impossible to apply this doctrine of consideration as a test of legal liability with consistency and justice. It can only properly be treated as one indication, amongst many others, that the parties entering into a transaction had in contemplation their legal relations to each other. He even roundly says that the decision of the judges in the case *Hopkins v. Logan* was due to the fear of letting the whole fabric of consideration fall to the ground had they decided otherwise. The facts of that case he quotes as follows:—*A* and *B* having had dealings together go over the account between them and agree to strike a balance at £500 as due to *A*, and *B* agrees to pay that sum upon request. *B* is liable to *A* if he breaks his promise. But suppose that *B* says he will pay the money that day week, *B* is not liable on this promise because there is no consideration for it.

Again, in cases where the Court has enforced a gratuitous promise to take charge of property, it is said that there is in such cases a consideration because "the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management." (a)

---

(a) Elements of Law, pp. 311, 316, 318.

In the case of *Thomas v. Thomas*(a) Patterson, J., distinguishes “motive” from “consideration” though we confess that we do not fully understand what he says. On the other hand, we find motive and consideration identified in the following words : —“ This act, abstinence or promise is the motive of the promisor’s promise, and is defined as the consideration for it.”(b) “Motive,” however, seems to be used in a rather loose sense by the commentators, for referring to Sec. 22 Indian Contract Act which provides that ‘a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact,’ it is said “mistake in the motive which induces a person to enter into a contract is no ground for avoiding it.”(c) Again, alluding to the same case (*Balfour v. The Sea, Fire and Life Assurance Co.*, 27 L. J. C. P., 17) it is remarked : “It turned out that the proceedings were ineffectual for the intended purpose : still it was held that the mistake of the defendant was no defence to an action on the bill, it being a mistake merely in motive.”(d) What happened here was that the defendants thought that arrangements for amalgamating their company with another were complete, and so gave a bill of exchange, whereas the arrangements proved abortive. There was thus merely a mistake in the knowledge of what had happened or a mistaken supposition as to what would happen, and to speak of ‘motive’ is misleading.

Sir Frederick Pollock, tracing the doctrine of consideration says that it came to mean in the end “that which induces a grant or promise.”(e)

So far as we can understand the matter, it would seem that, if it is to be of value, the doctrine must be founded on the view that mutuality is required and that such mutuality must be evidenced by some overt act by which each party places the other in possession of some advantage. A promise is an act yet to be performed which the law treats as such an act. There is an evident tendency

---

(a) 2 Q. B., 851, quoted in Cunningham and Shephard’s 9th Ed. of the Indian Contract Act, p. 15.

(b) *Ib.*, Introduction, p. iii.

(c) *Ib.*, p. 92.

(d) *Ib.*, p. 231.

(e) Pollock, Principles of Contract, 7th Ed., p. 170.



to regard 'consideration' as equivalent to motive, and yet it is found that 'motive' does not always contain all the meaning required. The case is therefore eminently one for a psychological analysis, in order to see what it is that is lacking and prevents the identification of the two terms.

'Motive,' we have seen, is the idea of a thing which excites the feelings, or you may speak of the desire of the thing as adopted by the self as the motive, but it does not seem to imply necessarily that anything has been already actually done or any advantage actually gained. But to be of any utility, that is to say to assist in deciding whether a contract is to be enforced or not, it seems to us that 'consideration' must mean something more than motive as described above. It must be equivalent to motive (in the sense of the idea of a thing which excites the feelings) plus something actually done or obtained at the time the idea is held out. The difficulty in the application of the doctrine seems to arise from the fact that this latter requirement is not in practice always insisted on, and hence there is no true mutuality and the doctrine is no longer applicable. It may be that for other reasons the agreement should be enforced, but it is a mistake to give fictitious grounds in such cases for holding that the promisor has got some actual advantage and so comes under the rule of 'consideration.' Sir Frederick Pollock's definition is, no doubt, true of every consideration, but it is vague and might embrace something that cannot usefully be treated as a consideration and further tends to introduce the causal conception without clearly defining the sense in which it is employed.

The same writer draws a distinction between 'motive' and 'intention' in speaking of the case *Williams v. Carwardine*, in which a reward had been offered by the defendant for information which

**Motive and intention.**

should lead to the discovery of a murder. Plaintiff made such a statement but not with a view to obtaining the reward, but the Court held that he had a good cause of action because he performed the condition mentioned in the advertisement and this effected a contract, and "the motive with which the information was given was immaterial." On this the author remarks "but on this it must be observed that the question is not of motive but of inten-



tion. The decision seems to set up a contract without any privity between the parties.”(a) We must confess that we do not understand the force of the first part of this criticism : motive, as the Court appear to have used the term, seems to be practically equivalent to intention, and the whole passage rather suggests that it is taken instead in the treatise to be much the same as consideration. The fact is that the term ‘ motive ’ is frequently used ambiguously : it sometimes refers “ to the various conations which come into play in the process of deliberation and tend to influence its result, or it may refer to the conations which we mentally assign as the ground or reason of our decision when it has been fully formed. In other words, a motive may be either a motive *for* voluntary decision or a motive *of* voluntary decision.”(b)

It is probably this double use of ‘ motive ’ which has led to unfruitful attempts to regard ‘ intention ’ and ‘ motive ’ as entirely apart. Thus Sir James Stephen speaking of ‘ malice ’ says : “ It seldom has any meaning except a misleading one. It refers not to intention but to motive and in almost all legal inquiries intention, as distinguished from motive, is the important matter.”(c)

Mr. Mayne also seems to consider that motive and intention can be distinguished without difficulty. “ Intention,” he says, “ must not be confounded with motive. Intention shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger : he neither intends to kill the man nor to do any act which could have that result. Motive is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal.”(d)

But what does Mr. Mayne mean when he says that ‘ intention shows the nature of the act which the man believes he is doing ’ ? Surely that the man puts before him a certain idea with the accom-

(a) Pollock, Principles of Contract, 7th Edn., pp. 21-2.

(b) Stout, Groundwork of Psychology, pp. 233-4.

(c) Stephen, Digest of the Criminal Law, 3rd Edn., p. 204, note 3.

(d) J. D. Mayne, Criminal Law of India, 3rd Edn., p. 244.

plishment of which he identifies his self : there is, as we have elsewhere said, the conscious presentation of an idea to the self as the object to be carried out. The important points are the idea and the presentation of it to the self. Do we find both these in motive, and if so, what else ? Motive, according to our author, is the reason which induces the man to do the act which he intends to do : but ' reason ' is simply again the idea, and the inducing is the presentation to the self, though we may add that there is also the feeling which the idea excites. Motive is certainly not anything apart from the self : it cannot be regarded as something existing externally to it but it only becomes a motive in so far as it encounters the self and is adopted by it as an object of attainment.<sup>(a)</sup> Hence arises the feeling which is absent in intention : " for the ' idea ' deals with an immediate content of experience and the properties that belong to it, without regard to the subject ; the ' feeling ' expresses the relation that invariably exists between this content and the subject." <sup>(b)</sup>

The difference between motive and intention seems therefore on analysis to depend on whether, when describing the mental state, we lay stress on the idea presented to the self or on the self to which the idea is presented and the manner of its presentation : in the former case we speak of intention, in the latter of motive, but in neither case can we attend exclusively to the one or the other. If we merely wish to describe the act we examine the content of the idea which came before the self, but if we wish to account for the act we look at the self and the way it was affected by the idea presented, or, in other words, we attend rather to the feeling excited by the idea. And this is natural because, as already stated, it is the feelings and not the intellect that explain conduct.

Motives, however, are not mere feelings : they are combinations of ideas and feelings. " Every motive may be divided into an ideational and an affective component. The first we may call the moving reason, the second the impelling feeling of action.

The reason for a criminal murder may be theft, removal of an enemy or some such idea, the impelling feeling, the feeling of want, hate, revenge or envy. When the emotions are of a composite

---

(a) See p. 96.

(b) W. Wundt, *Outlines of Psychology*, 2nd Edn., p. 184.



character, the reasons and impelling feelings are mixed, often to so great an extent that it would be difficult for the author of the act himself to decide which was the leading motive . . . In the combinations of ideas and feelings which we call motives, the final weight of importance in preparing for the act of will belongs to the feelings, that is, to the impelling feelings rather than to the ideas. This follows from the very fact that feelings are integral components of the volitional process itself while the ideas are of influence only indirectly, through their connections with the feelings.”(a) This passage illustrates clearly that when the term ‘ reason ’ is employed in describing motive, it is to the idea in it that the notion is attached, to the ideational component and not the affective one. But this ideational side of motive is equally present in intention, and therefore the distinction between them given by Mr. Mayne, *viz.*, that intention shows the nature of the act, motive the reason of it, is not the true one. The reason for the act is the idea in intention equally with the idea in motive, and any attempt to distinguish between the two psychical states must be made by laying stress on the feeling element which is present in motive but absent in intention : otherwise it seems to us practically impossible to keep separate meanings for the terms. On the other hand Messrs. Ameer Ali and Woodroffe seem to fall into the opposite error of entirely omitting the ideational element in motive when they write :—

“ Motive in the correct sense is the emotion supposed to have led to the act. The external fact which is sometimes styled the motive is merely the possible existing cause of this “ motive ” and not identical with the motive itself ; and the evidentiary question is not whether that external fact is admissible as a motive but whether it is admissible to show the probable existence of the emotion or motive. Generally the voluntary acts of sane persons have an impelling emotion or motive.”(b) This exposition leaves out of account that the emotion or impulse is guided by an idea, which is the ground of Mr. Mayne for identifying motive with reason. We do not think that the expedient of excluding the ideational component from motive and then coupling motive with an external fact as its possible cause is any improvement on Mr. Mayne’s ex-

---

(a) W. Wundt, *Outlines of Psychology*, 2nd Edn., p. 204.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 141.



planation. This so called external fact is really the end which is thought of or aimed at, and it is the idea of this end which supplies the notion of 'reason' which undoubtedly is included in the word 'motive' as popularly understood. Emotion alone does not give this idea. Indeed if motive is simply emotion it is misleading to say, as these authors do (see below) that a motive is strictly that which moves or influences the mind. The expression 'influences' clearly implies an idea which directs to an end.

Of course if you choose to confuse the various meanings of 'cause'—as to which see the chapter on  
**Motive and cause.** Causation—you can in one sense or other call many things a cause which are not really so, if you desire to retain any clear meaning for the causal conception. In this way 'motives' among other things may be termed causes, but no good in our opinion comes of confusing the Final with the Efficient Cause as appears to have been done in the following passage:—"A motive is, strictly, what its etymology indicates, that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars of external situation and conduct will in general correctly denote the motive for criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence."(a)

Now motive in the sense of that which moves the mind is the idea of physical force contained in efficient cause, but 'inducing' cause and 'influencing' is the idea of purpose contained in Final Cause; and while it is true that no action can be done without an agent to produce it, it is not equally true, if indeed it is true at all,—that every act must have a purpose, nor yet does every purpose produce an action. "Between Cause and Motive," says Wundt, "there is a very great difference. A cause necessarily produces its effect: not so a motive. A cause may, it is true, be rendered ineffective, or its effect may be changed by the presence of a second and contrary cause, but even then the result shows the traces of it, and that in measurable form. But a motive may either

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 140.

determine volition or may not determine it; and if the latter is the case, then exerts no demonstrable effect.”(a)

The fact is that though motives are of the nature of causes, they are a class of causes that will not admit of the mathematical or mechanical treatment which is applicable to the scientific and popular conceptions of the term. It is the principle of sufficient reason rather than of causation which explains the relation between motive and conduct. (b)

On the whole we should say that the comparison of motives and acts with cause and effect above quoted contains more falsehood than truth. It is true that every effect must have a cause, but it is most certainly untrue that every act must have a conscious motive, which is the sense in which ‘motive’ is there used. Apart from the fact that mere reflex actions have clearly no motives there are many acts which once had a motive but have now become mechanical in the course of evolution, *e. g.*, twitching the ears, &c. Again, “in every asylum,” writes Prof. James, “we find examples of absolutely unmotivated fear, anger, melancholy or conceit; and others of an equally unmotivated apathy which persists in spite of the best of outward reasons why it should give way,”(c) and we have already referred to one class of acts done without a motive on instinctive impulse in which there is not in our minds a further end to which the act is a means.(d)

Nor does it assist to say that ‘there must exist a motive for every *voluntary* act,’(e) for if any real meaning is to be given to ‘voluntary,’ such acts must be distinguished from impulsive ones: as Prof. Stout says, “voluntary action is to be sharply distinguished from impulsive action and deliberation from conflict of impulsive tendencies,”(f) and a very large part of our actions are impulsive. While if ‘voluntary’ is understood to imply an idea of the end in which the self is realised, then it is little better than

(a) Wundt, *Human and Animal Psychology*, pp. 432-3.

(b) *Cf.* J. Ward, *Naturalism and Agnosticism*, Vol. I, pp. 176-7.

(c) W. James, *Principles of Psychology*, Vol. II, p. 459.

(d) Preceding chapter, para. 3.

(e) This was laid down on pp. 66-7 of Ameer Ali and Woodroffe’s 2nd Edn. of their work but is slightly altered in the passage in the 5th Edition quoted above, we have left in our original criticism as it still applies to a considerable extent.

(f) Stout, *Manual of Psychology*, p. 601.



tautology to say that every voluntary act implies a motive, for motive is simply such an idea of an end exciting our feeling.

It is really the thinking of the end that makes it a motive, and, when this is realised, all analogy at all events to efficient cause is gone, and with it the necessary connection between antecedent and consequent on which the argument relies.

#### 9. The importance of understanding will

Will in voluntary confessions.	may also be illustrated by a reference to voluntary confessions and consent in both civil and criminal law.
--------------------------------	---

Although it is always laid down that confessions must be free and voluntary, the only way in which it is attempted to define the meaning of these expressions is by enumerating conditions which will invalidate the confession as, *e.g.*, that it must not be extracted by physical torture, coercion or duress of imprisonment, nor yet must an inducement be held out to the person confessing by anyone in authority. As it is impossible to enumerate everything which may constitute an inducement, or every one who may be in a position to influence the prisoner, many conflicting decisions on these points have resulted,<sup>(a)</sup> and it is clear that a definition of a less negative kind which had reference to the mental condition of the person himself would be more satisfactory. There is also another difficulty in the present method, *viz.*, that although there may be coercion, duress or an inducement offered, it does not follow that it was these or any of these which caused the prisoner to confess, and although it is usual for judges in such cases to assume the causal connection this reasoning may easily be fallacious, and in fact the principle is admitted that it is possible by warning to dissipate the influence of an illegal inducement.

What we want to arrive at in each case is what was the content of the idea in the prisoner's mind and how far it contributed to the result, and it seems to us that it should make no difference to the voluntary character of the act, if the idea was suggested to him by someone else, provided that he deliberately adopted it. It would, in such a case, be merely a matter of whether the prisoner really consented to the suggestion or not, and to determine this we must consider in what 'consent' consists.

---

(a) Best on Evidence, § 551 : Indian Evidence Act, s. 24.



Such definitions and explanations of 'consent' as we know of in law are not very promising. Section 90 of the Indian Penal Code lays down that it must not be given under fear of injury or under a misconception of fact to the knowledge of the person profiting by it, nor yet can it be given by a person of unsound mind or intoxicated. These again are merely negative conditions.

In section 13 of the Indian Contract Act it is said that "two or more persons are said to consent when they agree upon the same thing in the same sense," but this ignores the presence of will in consent, as to which the following may be quoted: "It is unqualifiedly true that if any thought do fill the mind exclusively, such filling is consent. The thought, for the time at any rate, carries the man and his will with it. But it is not true that the thought *need* fill the mind exclusively for consent to be there; for we often consent to things while thinking of other things, even of hostile things." (a)

We seem to be here on the right track, if the idea becomes dominant in the mind it carries the will with it, there must be, that is, an absence or extinguishing of contradictory ideas before we can consent to a thing. Thus the same writer says that belief is more allied to the emotions than anything else: it resembles consent which is a manifestation of our active nature. "What characterizes both consent and belief is the cessation of theoretic agitation, through the advent of an idea which is inwardly stable, and fills the mind solidly to the exclusion of contradictory ideas. When this is the case motor effects are apt to follow. Hence the states of consent and belief, characterized by repose on the purely intellectual side, are both intimately connected with subsequent practical activity." (b)

The following remarks in the commentary seem therefore to be inadequate: "to determine what are the essentials of consent is equivalent to determining what kinds of error or misunderstanding are incompatible with its existence," and again quoting Lord Cairns in the case of *Cundy v. Lindsay*, 3 App. Cases, 464, "of him they knew nothing and of him they never thought. With him they never intended to deal. Their minds never, even for an in-

---

(a) James, *op. cit.*, Vol. II, p. 568.

(b) *Ibid.*, pp. 283-4.

stant of time, rested upon him, and as between him and them there was no consensus of mind which would lead to any agreement or any contract whatever.”(a) To define consent as a ‘consensus of mind’ is merely to repeat the same thing without explaining and further to introduce the additional idea of ‘mind’ which itself needs explanation.

Somewhat similarly in his remarks concerning the nature and scope of consent in contracts Sir Frederick Pollock says that ‘there must be the meeting of two minds in one and the same intention,’ and he proceeds to add that ‘there must be included an intention that the matter in hand shall, if necessary, be dealt with by a Court of justice.’ It is evident that this imports into ‘consent’ much more than is included in the ordinary acceptation of the term, while the failure to recognize the presence of will in some form in consent ends in a curious result. After quoting with approval a dictum to the effect that “mental acts or acts of the will are not the materials out of which promises are made,” and that therefore a party is not allowed in law to show that his intention was not in truth such as he made or suffered it to appear, he is finally landed in a distinction between ‘real’ and ‘apparent’ consent.(b) Yet if this antithesis is a real one, paradox will be a mild description of what this apparent consent must be, while it will at the same time be difficult to see how, if the man intends something different from what the other party understands him by his conduct to intend, this can possibly be termed ‘consent’ in the sense of ‘the meeting of two minds in one and the same intention.’

If we turn to the definition of ‘free consent’ (s. 14) we find again merely an enumeration of what negatives consent, *viz.*, coercion, undue influence, fraud, misrepresentation and mistake, but in the definition of undue influence (s. 16) it is said that the relations between the parties are such ‘that one of the parties is in a position to dominate the will of the other.’ It is clear therefore that there is this idea of ‘will’ in consent, and that when the will is dominated it is not considered to be a real consent: this is also expressed in the note to s. 14. “On the other hand, there

---

(a) Cunningham and Shephard, 9th Edn., Indian Contract Act, pp. 48-49.

(b) Pollock, Principles of Contract, 7th Edn., pp. 3, 5.

may be such force or fraud as to exclude the notion of will and to make the transaction void, as not being the act of the person to whom it is imputed.”(a)

The expression ‘dominate the will’ makes it necessary to explain what is meant by ‘forcing the will.’

Meaning of ‘forcing the will.’ You cannot by compulsion cause a volition in another man, but you may lead to it: the psychical conditions of volition can be suppressed so that it becomes impossible for a man to decide for himself for this and not for that. As Mr. Bradley says(b): “If a pistol is suddenly presented at my head what I do before I have time to collect myself may not be imputable to me at all . . . . given extreme terror or great bodily weakness or some abnormal state of mind, a deed may be done on compulsion, not only without conscious will, but also without the possibility of it.” But further than this when we do know what we are doing, but not so far as to perceive it in relation to other things, we do not collect ourselves and do not know the deed in its specific character. “For instance, if a woman is to sign some document which may be a gross wrong upon her children, she, I suppose, may be so frightened by violence, that she signs, knowing that she is signing, but not at the moment knowing anything but that she is signing.” And lastly when I know what I am doing and also know the quality of it, know the relation in which it stands to the rest of my life and know that it is wrong, even here, if I cannot collect myself so as by conscious volition to decide one way or other, my will is forced. If force is put upon me, whether proceeding simply from an uncontrollable element of my nature, or in addition, from a will outside me, so that volition becomes a psychical impossibility, and where it is not my fault that it is so impossible, I am not responsible. Such cases occur with the insane and with some people whose energy has been destroyed by violent physical pain and great weakness or under the influence of violent emotion.(c) Further remarks on this subject will be found under the heading ‘Responsibility.’ At the same time ‘consent’ is not synonymous with will, and there are cases of consent in which

---

(a) Cunningham and Shephard, *op. cit.*, p. 53.

(b) Bradley, *Ethical Studies*, p. 41.

(c) *Ibid.*, p. 42.



the person consenting does not go so far as to do any act. There is here merely the mental attitude of one agent towards the act of another : he simply abstains from resistance and that is all. Mr. Bradley maintains<sup>(a)</sup> that all consent, whether tacit or expressed, is given in the end to a foreign will. But such consent does not make a man the real doer of the act in question, and therefore stops short of volition : for you cannot get rid of the idea of the foreignness of the will from which the act proceeds, and if consent passes into an attempt to further the act or commit it in common, it has ceased to be mere consent.

We are inclined to think this is rather over-refining at all events for the purpose for which we are seeking to define consent, and prefer to retain the view that consent carries the will with it. The difficulty of fixing the mental state of consent lies mainly, as he observes, in knowing the exact nature of that to which at the moment consent is given : for the consent is given to something as it appears at one moment to the consenter, and as at that moment it is qualified by his feelings. But the exact nature of such an impression as it happens in another, can be arrived at only by approximation and always presumptively. The same reason will explain, why persons will afterwards often deny that they consented to a thing, to which they really gave their consent at the time : especially is this the case in prosecutions for rape, where the prosecutrix doubtless sometimes really does believe subsequently that she did not consent to the sexual intercourse at the time. With a change of feeling things appear to her in a different light.

To return then to the question of voluntary confessions, it appears to us that in few cases can it be said that the prisoner's will is forced in any of the senses indicated above, and that there is, at all events in India,<sup>(b)</sup> too wide a tendency to discredit such statements on the ground of their involuntariness ; and we must repeat that if the prisoner assents to a suggestion it may be, and probably usually is, a voluntary act on his part. For the kind of definition that we are seeking will be arrived at by considering not what must be absent but what must be present for voluntary decision, and

---

(a) Mind N. S., pp. 158-160.

(b) See, *e.g.*, the various dicta of Indian Judges quoted on pages 256-7, Ameer Ali and Woodroffe, *op. cit.*

this is said by Prof. Stout to be the intervention of self-consciousness as a co-operating factor. By this is meant that the agent must mentally realise the bearing of the contemplated course of action on his interests as a whole, (a) but how that course of action is suggested to him is immaterial.

Indeed it is doubtful whether notions of inducement and involuntariness are not mutually incompatible, and therefore whether it would not be better to dissociate altogether such grounds from one another and to regard them as separate reasons for holding confessions to be inadmissible. We cannot, however, undertake to discuss 'inducement' here, for when it is said to be "a term which is extensive enough to include torture," (b) and again that it "need not be expressed, but may be implied from the conduct of the person in authority . . . or the circumstances of the case," (c) it appears to us to cease to have any very distinctive meaning.

10. There is perhaps no branch of the law—unless it be that of breach of promise of marriage—which is regarded by the outside man as so uncertain and unsatisfactory in its application as the law of libel and defamation. We believe this to be due to the fact that the defendant finds himself credited on many occasions with intentions which he never had, and the reason of this is partly the extraordinary use of the legal term 'malice' in English law and partly the unqualified employment of the doctrine that every man must be taken to know and therefore to intend the natural results of his words.

Libel in English law consists in maliciously publishing defamatory matter of any person, and "malice" in its legal sense means a wrongful act done intentionally and without just cause or excuse. "From the nature of the case the publication of a libel must be an intentional act." (d) There is a step in the argument here which is slurred over: the reasoning is that, because a wrongful act is done intentionally, therefore the wrong must have been intended and in consequence the wrongful intention may be inferred from the mere

---

(a) Stout, *Groundwork of Psychology*, pp. 232-3.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 256.

(c) *Ibid.*, p. 259.

(d) Stephen, *Digest of Criminal Law*, 3rd Edn., Arts. 267, 271, and note 2 to that Art.



act itself. But in order to prove that the act was *wrongful* in the first place some intention on the part of the doer is really needed to be shown: the mere physical act or the mere utterance of the words does not in itself prove a wrongful intention, and it is only by resorting to the plan of inferring intention entirely from results, that you can argue that because an act produces harm to the complainant therefore the accused intended that harm, a conclusion which may be altogether erroneous. The argument is in fact a circular one when closely examined. “The law always presumes a wrongful intention as accompanying a ‘wrongful’ act without any proof of malice:” (a) ‘wrongful’ is what is forbidden by law, but the criminal law (and we are here concerned with a criminal offence) does not create offences without reference to intention: as Sir J. F. Stephen himself says in his *General View of the Criminal Law of England*: “No action is criminal in itself unless the intent, the mental element of it, is a state of mind forbidden to the law.” (b)

Part at least of the offence is due either to a wrong intention or the lack of a right intention in the matter, and therefore when a ‘wrongful’ act is spoken of there is a tacit assumption made that there has been a wrong intention displayed in the case. To say therefore that from a wrongful act the law presumes the intention is in reality to assume—without first proving it,—a wrong intention accompanying the act and then to infer a wrongful intention from itself as so assumed: there is thus no real inference at all from the nature of the act itself, but the conclusion is begged from the outset by the use of the word ‘wrongful.’

The legal sense of ‘malice,’ as it is termed, is in effect a device to abolish the question of intention altogether in libel cases, as is openly stated, *e.g.*, by Lord Esher in the following: “If the matter stood there without more the law would infer malice, the meaning of which really is that it does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not;” (c) and

---

(a) *Bromage v. Prosser*, 4 B. & C., at p. 255.

(b) Stephen, *A General View of the Criminal Law of England*, p. 81.

(c) *Nevill v. Fine Arts Insurance Co.*, quoted on p. 884 of Mayne’s *Criminal Law of India*.



again: "The judge ought not to leave to the jury whether the defendant intended by a libel to injure the plaintiff. Every man is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff, the law will assume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect." (a)

The law has in fact succeeded in depriving 'malice' of all meaning, and it might just as well be omitted from the definition of the offence of libel: at the same time as you cannot in practice divest words of their natural meaning, (b) it has not been altogether consistent in its use of the term and it has to admit occasional failures. It is laid down (c) that it is not libel to publish an extract or abstract of Parliamentary proceedings if it is shown by the party accused that such extract or abstract was published *bonâ fide* and without malice. Here 'malice' must clearly be given some positive meaning, and the learned author of the Digest accordingly remarks: "the word 'malice' must have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parliamentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B's character, and so publishes both *bonâ fide* and with malice. It is absurd to say he is indictable, yet, if he is not, what is the sense of the word 'malice'? It seldom has any meaning except a misleading one. It refers not to intention but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill-will, but an ill-will which it is immoral to feel. No one would describe legitimate indignation as 'malice.' The word is entirely avoided in the Indian Penal Code." (d)

We cannot regard this note as satisfactory, but all that we desire here to point out is that it is an open admission that the legal sense of malice is not always adhered to, but the word is sometimes given its popular sense even in law; that the term 'malice' is a

---

(a) *Haire v. Wilson*, quoted *ibid.*, p. 885.

(b) See p. 32.

(c) Stephen, Digest, Art. 275 and note 3 thereon.

(d) Note 3 to Art. 275.

misleading one, and is apparently on that account avoided in the Indian Penal Code.

But surely there is something wrong when a word which has a definite and well-understood meaning in the English language is adopted for use in our law, and then given an avowedly different meaning which it is found cannot be adhered to, and is finally stigmatised as a misleading term, and definitely discarded on that account from a newer branch of law. It is proclaimed that “ In the English law of libel, *malice is said to be the gist of action for defamation ;*”(a) and again “ according to English law ‘ it is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff ; but unless the defendant does so, the plaintiff is not called upon to prove actual malice.’ The reason of this is that in English law *the essence of the offence is an intention to do a wrongful act :*”(b) yet when the meaning given to ‘ malice ’ comes to be interpreted, it is found either to be misleading where it is not used in the legal sense, or, when used in that sense, practically non-existent : at least the term is so far deprived of any meaning that concerns intention that with the aid of the legal presumption above referred to, it might be excised from the definition of the offence without any difference to the result arrived at. The unsatisfactory state of the law and the confusion arising from the employment of such terms as ‘ implied malice,’ ‘ express malice,’ ‘ actual malice,’ ‘ malice in fact,’ etc., is recognised, *e.g.*, by Sir J. F. Stephen,(c) but these writers do not appear to perceive that the true cause of the trouble has been the attempt to evade a real decision as to the intention of the defendant, by employing a short cut in the shape of a legal presumption which claims to be of universal validity but which is in fact inapplicable to cases of this kind. This inapplicability is demonstrated here by the fact that having assigned to malice an impossible meaning, even when assisted by the doctrine in question our lawyers have then been compelled to introduce an ‘ actual ’ or

(a) *Wason v. Walter*, L. R., 4 Q. B., 73, at p. 87.

(b) Mayne, *op. cit.*, p. 896.

(c) See Note X, pp. 383—5 of the Digest.



‘express malice,’ which is nothing more than malice in its popular sense, in order to oppose their own legal conception and counteract some of the injustice which it worked.

It is a striking instance of an attempt on the part of the law to ignore intention and use an ordinary word of the English language in a sense different from that popularly accepted. The attempt ends in complete defeat which was admitted by Sir James Stephen when he said “it will be found in practice impossible to attach to the words ‘malice’ and ‘malicious’ any other meaning than that which properly belongs to them of wickedness and wicked.”(a) It is grudgingly allowed by Sir Frederick Pollock who says that in some exceptional cases the disposition from which an act proceeds is taken into account by the law and instances “malice” when it means anything more than the intention of doing an unlawful act as such a case.(b) It is openly confessed by Sir William Markby who explains that the word originally meant much the same as ‘malevolence’ and was then transferred to intention and the idea of badness of motive altogether disappeared. He nevertheless finds the legal use of “malice in fact” and “malice in law” so confusing because malice is assumed by the law when “there could be no malice in any reasonable sense of the word,” that he suggests that it would be much better if “the phantom called ‘malice in law’” were done away with and it was said plainly that no malice was necessary.(c) This would certainly be more honest but not more acceptable to the community whose complaint already is that they are often punished for the use of words proceeding from no improper motive. The law cannot create offences contrary to the sentiment of the people merely because such offences would be easier to prove, and the sooner the lawyers cease to seek a remedy in the way of ignoring the mental state the more likely they will be to earn the approval of society.

11. As the difficulties with regard to malice are recognised by English legal writers, and it is made a matter of congratulation that the word has been al-
- (b) in Indian Law.

(a) Stephen, A general view of the Criminal Law of England, p. 82.

(b) Pollock, A First Book of Jurisprudence, p. 146.

(c) Markby, Elements of Law, p. 335.



together avoided in the Indian Penal Code, one would imagine that special care would be taken by commentators and judges to see that the Indian law of defamation did not become entangled with the English law of libel, and that the confused notions of the latter were not introduced into the interpretation of the former. The actual definition in the Code lays stress on intention, running as follows:—"Whoever by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." (a)

What, however, do we find? If one turns to Mr. Mayne's Commentary on the Code as soon as he undertakes to explain intention to injure, we find immediate appeals to decisions in English law and introduction of the doctrine of malice, and our commentator sets himself to show that the English and Indian laws are the same. After quoting several of such decisions he concludes as follows (§ 667):—"It seems to me that there is nothing in the language of the Code which leads to any different conclusions. When a defendant says that he did not intend to damage the reputation of the prosecutor, what does he mean? Does he mean that he did not intend by his language to convey anything that would harm the character of the prosecutor; or that he was justified in saying what he did, but that his object was not to injure the complainant, but to discharge a duty; or, that in using language of a defamatory nature, he had no wish to hurt him, and did not suppose he would be hurt? It is obvious that in the first case what he really asserts is that a false construction has been put upon his words. *Primâ facie* a man's words must be judged according to the meaning which is ordinarily put upon them. . . . . Again, a man who speaks will be judged according to the effect produced on those to whom he speaks. He is not answerable for the effect produced on those to whom his words are repeated, unless he intended them to be repeated, or addressed them to a person whose duty it was to repeat them. . . . . In all such cases the real defence

---

(a) I. P. C., s. 499.

is that the words used had not a defamatory meaning, and before there can be a conviction this defence must have been negatived by those upon whom the decision depends. The question of intention, as an independent line of defence, can, in this point of view, never arise. The third line of defence is obviously untenable. It is not necessary to show that the defendant intended to hurt the man he maligns. It is sufficient under the Code to show that he knew or had reason to believe, the imputation would do harm. This must be judged of by the nature of the act done, just as if the accused had stabbed the prosecutor with a knife. As Sir James Stephen says: "I don't think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." (a)

It is not our intention to repeat here all that we have said against the legal presumption that a man must be taken to intend the natural consequences of his act or, rather here, of his words: what we wish to point out is that the application of this presumption has the effect of throwing the burden of proof on the accused straight away, just as the legal presumption of malice in English law assigns to the defendant at once a wrong intention, merely because of the results of his words. When it is glibly said that '*prima facie* a man's words must be judged according to the meaning which is *ordinarily* put upon them,' it does not seem to be comprehended that there is no standard by which it can be judged what the ordinary meaning is, and that every circumstance under which such words are spoken are particular circumstances which go to make the meaning of the words. There is no such condition as that of general or ordinary circumstances which impart no special meaning to the words, but leave them colourless and intelligible to a man of no particular characteristics who represents the disinterested observer of the piece. This view is a fiction of the law which no psychologist could for a moment entertain, and we have, in our opinion, exposed its sham character in our chapter on the Normal

---

(a) Mayne's Criminal Law of India, 3rd Edn., pp. 885, *et seq.*



Man.(a) That his standard of ' the meaning ordinarily put upon them ' is not one that can be trusted or readily applied is in fact illustrated by Mr. Mayne's own work, for he has no sooner announced his method than he proceeds to fill up the rest of the page with instances that are exceptions to it ; these instances are simply particular cases in which the words spoken have not the meaning ' ordinarily put upon them,' and we do not suppose him to imply that the exceptions are limited in number to those which he here quotes. Further, the dictum of Sir James Stephen, we may remind him, does not say that a man's intention is to be discovered by considering what must have appeared to an ordinary man at the time the natural consequences of his conduct, but what must have appeared to the agent himself. This is to be collected, we presume, from what the man not only did, but also said at the time, and by a consideration of the man's temperament, education, etc., and his own explanation of the matter. To take the ordinary man and say that he is equivalent to the individual in this particular case, apart from the difficulty of constructing the ordinary man, is to neglect all that goes to make up the individual and to force on him the task of proving that he is something else than he has, for no reason at all, been arbitrarily assumed to be.

Having adopted this unconscionable method of discovering intention, and created, so to speak, a meaningless intention which corresponds to malice in the legal sense, as used in English law, exactly the same result follows, *viz.*, that an ' intention ' with some meaning in it has to be subsequently introduced into the Indian law of defamation in order to counteract the effects of the legal construction. Explanation 1 to s. 499, I. P. C., is as follows :—" It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of the family or other near relatives." The words ' knowing or having reason to believe, etc., ' do not occur here and so Mr. Mayne is constrained to explain as under (§ 668) :—" In order to bring within the terms of this section defamatory matter relating to a deceased person, it will be necessary to show, not only that the deceased might have

---

(a) See Chap. VII.



complained of it, but also that it was written, or spoken, with the intention of insulting his surviving relations. *I conceive that the words 'intended to be hurtful, etc.,' in Explanation 1, must be taken as meaning an express and primary intention, as distinguished from a legal and implied intention.'*

We thus have now an 'express intention,' a 'primary intention,' and an 'implied intention' corresponding to the 'express malice,' 'actual malice,' and 'implied malice' of English law, and so although the word 'malice' may have been carefully excluded from the Indian Penal Code by the Legislature, through the ingenuity of our commentator it has been brought back again in a different dress together with all the confusion that it involves. The mistake appears to us to be the introduction of the idea of 'implied intention,' which cannot be adhered to consistently and indeed it seems this interpretation of intention is lightly thrown over when it proves inconvenient. Thus we find (§ 689) :—"Under the Penal Code a person is only liable for making or publishing an imputation when he does so 'intending to harm, or knowing or having reason to believe' that such imputation will do harm. *These words cannot mean less than the wilful intention to do a wrongful act, or the connivance at, or tacit permission to publish libels of the sort complained of, which would amount to an authority to publish any particular libel.*"(a) We ask the candid reader whether such expressions really do convey to him the same meaning as the 'implied intention' of the above doctrine, and, if not, whether it is not now plain to him why, amid such a wilderness of interpretations of the mental states as he has just been through, the hapless accused is himself at a loss to know whether he has or has not committed a criminal offence? But there is a legal maxim '*ignorantia juris non excusat.*'

---

(a) Mayne, *op. cit.*, p. 915.

## CHAPTER V.

### MEMORY.

Importance of Memory—Memory distinguished from Retentiveness, Recognition and Fancy—Conditions of Memory—Varieties of Individual Memory—Effect of Emotion on Memory—Exceptional Memory displayed in certain Pathological States—Revival of memory—The subjective feeling of certainty as to recollection not to be trusted—Power of Imaging in Memory—Necessity of an existing cause to awake Recollection—Remembrance of familiar objects—Marks as aids to Memory explained—Reasons cannot always be given for Recollection—Memory and Inference—Various Aids to Recollection—Corroboration by consistency—Refreshing Memory by written Memoranda—Memory and Feeling—Amnesia—Illusions of Memory and their Causes.

Note on a view of Memory founded on the transmission theory of Consciousness.

“ THE capacity of a party to give a faithful account of things, depends on,” says Best, . . . .

Importance of  
memory.

“ 4. His memory ; and here, whether the transaction is ancient or recent, whether his recol-

lection has been refreshed by memorandum, conversation, etc.” (a) This admits the importance of memory but hardly seems an adequate treatment of the subject : yet it is practically all that is to be found about it in the volume. We shall enter into the matter more deeply and shall begin by distinguishing memory from certain other mental states.

In the first place, although memory is used as the general name, it is not the same as Retentiveness : in memory there is necessarily some contrast of past and present, in Retentiveness nothing but the persistence of the old.(b) Again, though it includes Recognition, Recognition as such does not include Memory in which there is also remembrance of the time and circumstances in which an impression, piece of knowledge, etc., was acquired. When we find ourselves

Memory distinguished from other states.

---

(a) Best on Evidence, 9th Edn., p. 14.

(b) J. Ward, Encyclopædia Britannica, 9th Edn., Vol. XX, art. Psychology. p. 47.

suddenly reminded by what is happening of a preceding experience exactly like it, if we are unable to assign to such representation a place in the past, instead of a belief that it happened there arises bewilderment.(a)

We distinguish Imagination from Memory because in the former there is no Recognition, and because of the fixed order and position of the ideas of what is remembered or expected as contrasted with the liberty of the imagination to transpose and change its ideas : at the same time the machinery of memory must be largely determined by men's powers of imagining which differ greatly, as will be explained later.(b) The usual distinction between Fancy and Memory is that memory-images are ideas which exactly reproduce some previous perception, while fancy-images consist of a combination of elements taken from a whole number of perceptions, but Wundt refuses to accept this on the ground that you never do get such memory-images : we never represent exactly but always leave out much and add much that was not there, and ideas are never twice alike. He explains fancy as due to indirect associations of ideas, the secondary ideas being there but not perceived.(c)

In the present chapter, unless it seems specially called for, no precise distinction will be observed between Memory and Recognition, and Retentiveness will be treated as the basis of Memory.

A man's native retentiveness depends on the brain tissue and is unchangeable. "No amount of culture," Retentiveness. says Prof. James, "would seem capable of modifying a man's 'General Retentiveness.' This is a physiological quality, given once for all with his organization and which he can never hope to change. It differs no doubt in disease and health . . . it is better in fresh and vigorous hours than when we are fagged or ill."(d) At the same time retentiveness is effected in other ways which we shall now proceed to consider as the conditions of memory.

---

(a) J. Ward, *Encyclopædia Britannica*, 9th Edn., Vol. XX, art. Psychology, p. 63.

(b) W. James, *Principles of Psychology*, Vol. I, p. 684.

(c) Wundt, *Human and Animal Psychology*, pp. 289, 306-7.

(d) James, *op. cit.*, Vol. I, pp. 663-4.



2. The following are some of the mental conditions of memory.

**The conditions of memory.** *Firstly*, as regards the circumstances of the moment of the original appearance, it depends on (a) the degree of impressiveness of the original experience, *i.e.*, the amount of interest it awakened and of attention it excited. But (b) the absence of impressiveness may be made good by a repetition of the actual experience or by the fact of previous mnemonic revivals. Time and Repetition are required for memory to be established. (c) Our state of health and general vital power affects our ability to take in impressions. (d) The presentative element must have intensity and distinctness and also sufficient duration. *Secondly*, as regards the moment of the re-appearance : here the pre-existing mental conditions and association of ideas are the important matters. Every recollection is determined by some link of association, which may be either of contiguity or similarity, *i.e.*, the original experiences may have occurred at the same time or in close succession, or the sight of one place or person recalls that of another place or person.

Again, a fresh and healthy brain is also required for reproduction, and we are also influenced by our emotional states, while much depends on the nature of the memories themselves. The more simple and less complex easily disappear, and those which have many strongly marked and distinctive sides are better retained. We are further aided by the recency of the occurrence and our own powers of imagination.(a)

The above is a mere summary and not intended to be exhaustive: it will be both amplified and supplemented in the course of the following pages under various heads.

3. No one will probably dispute that different men have different powers of memory, but the point to which we now wish to draw attention is that there are different kinds of memory. For we conceive that there cannot be a greater mistake than to assume that we can judge off-hand of the possibility of an alleged act of remembrance, either by reference to our own powers or to a supposed average

**Varieties of individual memory.**

---

(a) Sully, *Illusions*, p. 236 ; *Outlines of Psychology*, p. 175 ; Höfding, *Outlines of Psychology*, pp. 148, 150

power of recollection, or again that we can be at all sure of how much any man can be reasonably expected to remember under any particular circumstances. We are aware that such estimates are confidently made by judges and advocates in spite of the statements of witnesses that they do actually recollect more or less than is supposed to be possible or reasonable, and the more we have studied memory and all that affects it, the less we feel disposed to accept the sceptical views of the law courts concerning it.

The varieties which we are about to speak of are pure individual differences of memory. "Idiosyncracies are however frequent," says Dr. Ward, "thus we find one person has an exceptional memory for sounds, another for colour, another for forms." (a) The kinds of images employed in memory are as numerous as the different kinds of sensations, *viz.*, visual, auditory, tactile, motor etc. : we may use them singly or cumulatively, but each has his own habits and according as visual or auditory images predominate with him, he will have a good memory for sights or sounds. The indifferent kind are those in whom one type of memory is equal to another. (b) "The statistical investigations of Mr. F. Galton," says Prof. Sully, "into the nature of visual representation, or what he calls 'visualization' go to show that this power varies greatly among individuals (of the same race) that many persons have very little ability to call up distinct mental pictures of such familiar objects as the breakfast table." (c) It also varies with race, sex and age.

It seems to us plain that the power of recollecting a scene will depend very much on a man's power of visualization, and if one who has got this power judges one who has not, or *vice versâ*, his estimate of the truth of the latter's statements is likely to be very erroneous, unless he has some psychological knowledge of memory. The importance of this matter for the law courts is considered so great by Prof. Munsterberg that he advocates the psychological examination of a witness to ascertain in what direction his memory is probably trustworthy and reliable. Such a practice would have

---

(a) J. Ward, *op. cit.*, p. 61 ; Sully, *Outlines of Psychology*, p. 217.

(b) Binet, *Psychology of Reasoning*, p. 13.

(c) Sully, *op. cit.*, p. 174.



several advantages. The result would give confidence to a judge when asked to credit a witness who appeared to speak from exceptional memory on some important point : he would feel safer in either doing so or refusing to do so when he had some real ground by which to estimate the witness' power. There would then be less excuse for professing doubt as to the word of an apparently respectable man on the ground that his memory might have played him tricks, the not uncommon resort at present of a weak judge. Inasmuch however as the test would reveal the weakness as well as the strength of a memory, it would also sometimes save the judge from the error of regarding a witness as shifty and unreliable who professed himself unable to recollect events which it appeared to the court he should naturally remember. It may be objected that such an examination would take up much time : the actual examination would not do so when such a system had once been established, but it is clear that it would also save much time. For at present an advocate considers that he is justified in asking any number of questions in order to show that the witness' powers of memory are weak generally : he does not select his questions so as to show that the memory is weak in respect of sights or sounds or colours, etc. Yet this is the way in which the court should compel him to ask them, and it should save its time by excluding other questions when it had been ascertained by psychological examination in which direction the witness' powers lay and when it is clear that on the point at issue the reliability of only one kind of memory need be tested. For, as Prof. Munsterberg says, just as we should not ask a short-sighted man for the slight visual details of a far distant scene, so it is not safer to ask a man of the acoustical memory type for strictly optical recollections. Now he is asked what he has spoken, what he has seen, what he has heard, how he has acted, although the mechanism of his memory may be excellent for one of these four groups of questions but useless for the others. We do not see why it should be doubted that a trained psychologist could make a successful examination of the kind suggested, but we expect that the lawyers, being ignorant of what psychology has already done in this way, will be incredulous in the matter. We therefore quote Prof. Munsterberg's words for those who are open to conviction :—

“ The Courts will have to learn, sooner or later, that the individual



differences of men can be tested to-day by the methods of experimental psychology far beyond anything which common-sense and social experience suggest.”(a)

Apart from the kind mentioned above, there are yet other differences of individual memory as to which the following may be quoted: “Speaking generally and disregarding individual differences, we may say that the higher the sense in point of discriminative refinement the better, *i.e.*, the more distinct and complete the corresponding power of reproduction. Thus of all presentations visual percepts are recalled the best: then come sounds, touches, tastes and smells.” Individual differences of memory depend on “(1) special sense-discrimination to start with, and (2) special interests and habits of attention leading to greater depth of impression and better association in the case of particular groups of presentations.”(b)

We recollect to have seen it stated more than once that an uneducated villager could not possibly have remembered all he stated in court and has clearly been taught by the police or the headman of the village or by whoever can conveniently be made the villain of the piece: we would therefore warn the reader that there are no valid grounds for attributing bad memory to uneducated persons.(c) We do not suppose that a similar dictum would be accepted if the witness were a philosopher or a mathematician, yet it is a psychological fact that savages and uneducated persons have more powers of visualising than persons whose interests are rather in the abstract: but there is also another reason. Where the range of interest is narrow, it is concentrated, and, as pointed out in the case of the idiot, the memory is therefore likely to be exact within the limits of observation. Good memory is partly due to the interest we take in a matter and partly mechanical, and the educated rarely have the latter kind because they have developed the former at its expense: high mental power is seldom combined with good mechanical memory. You may see sometimes how well ponies remember a road because they do not think as they go along and so the land-

---

(a) H. Munsterberg, *Psychology and Crime*, pp. 61—63.

(b) Sully, *op. cit.*, pp. 216-7.

(c) Stout, *Manual of Psychology*, p. 425.

marks are the only things impressed on them : the savage is a modified instance of the same kind. That he should have an excellent memory of the mechanical kind might have been suggested by the way that Homer's poems and other long epics have been handed down correctly by quite uneducated persons.

As the mechanical memory depends on the juxtaposition of events in space and time as opposed to the memory which depends on intelligent interest, there is nothing surprising in the fact that a Burman villager remembers whether he went to the right or left or whether this or that person was facing north or south, for these are the kinds of questions which many advocates ask, although he may be relating events which happened long ago.

4. Allusion has already been made to emotion as influencing memory. There is a mistaken impression that fear prevents attention to what is going on and therefore hinders memory, and it has been argued before the writer more than once that a narrative or an identification is not reliable because the witness being frightened at the time could not have noticed or recollected what she states. This is a frequent incident of a dacoity or robbery case. It is well, therefore, to state exactly what the effect of fear is. It may be that the fear is so great as totally to paralyse the mind, as *e.g.*, when the serpent fascinates its prey, and in such cases the argument would have foundation : but this is rarely so, and usually a person under its influence observes better and remembers clearly. Nor is this strange if we realise the character of emotion. "Fear," says Darwin, "is often preceded by astonishment, and is so far akin to it that both lead to the sense of sight and hearing being instantly aroused."<sup>(a)</sup> It leads us to attend minutely to everything around us because we are then specially interested in them, as they are likely to concern us intimately. So Bain says "With regard to the intellect the characters of the emotion are very marked. The concentration of energy in the perceptions and the allied intellectual trains gives an extraordinary impressiveness to the objects and circumstances of the feeling. In a house believed to be haunted every sound is listened to with avidity ; every breath of wind is in-

Effect of Emotion  
and similar conditions  
on memory.

---

(a) Darwin, *Origin of the Emotions*, p. 290.

terpreted as the approach of the dreaded spirit : hence for securing attention to a limited subject, the feeling is highly efficacious.”(a)

To the same effect again Prof. Sully says : “ The essential element in interest is feeling, and any marked accompaniment of feeling, whether pleasurable or painful, is, as we all know, a great aid to retention. Thus the events of our early childhood which we permanently retain commonly show an accompaniment of strong feeling, more particularly perhaps that of childish wonder at something new and marvellous, whether delightful or terrible. The effect of disagreeable feeling in fixing impression is illustrated in the retention of the image of an ugly or malevolent-looking face, of words in a foreign language which have disagreeable sensations,” etc.(b) And again “ Differences in emotional condition, which appear to involve variations in the energy and rapidity of brain-action render us much more impressionable at some moments than at others. As more than one novelist have illustrated, moments of intense feeling appear to raise the plastic or acquisitive powers of the brain to a preternatural height, so that small and insignificant details of the objects happening to present themselves at the moment are permanently reflected in the mirror of the mind.”(c)

Speaking of the influence of emotion on the thoughts the same writer says : “ Emotion as cerebral excitement is in its less agitating degrees distinctly promotive of ideation. We never have in our cooler moments such a swift rush of ideas as we have in moments of emotional excitement. This exhilarating effect is, of course, seen most plainly in the case of pleasurable emotion, . . . but it is not wanting in the case of painful emotion, provided it is confined to the stimulatory pitch and is not allowed to become prostrating.”(d) He then points out that great emotion tends to colour or give a particular direction to the ideas of the time, a fact also noted by Professor James as follows :—“ When any strong emotional state whatever is upon us the tendency is for no images

---

(a) Bain, *Mental and Moral Science*, p. 234.

(b) Sully, *op. cit.*, p. 176.

(c) *Ibid.*, p. 177.

(d) Sully, *op. cit.*, p. 341.



but such as are congruous with it to come up. If others by chance offer themselves they are instantly smothered and crowded out.”(a)

There is then this danger, for it will equally affect our recollection of events, but apart from this, the effect of fear, so far from hindering recollection, is to aid it by giving special vividness, distinctness and persistence to the images called up at the time.

Exceptional memory is also displayed in certain pathological states which are akin to emotion. The explanation is that general excitation of memory seems to depend on physiological causes and particularly on the rapidity of the cerebral circulation. Hence it appears in acute fevers, in maniacal excitation, in ecstasy, hypnotism and sometimes in hysteria and the early stages of certain diseases of the brain. The cases of the extraordinary memory of persons in the act of drowning are regarded by Ribot as due to the effect of the asphyxia. De Quincey also refers to a somewhat similar experience caused by intoxication from opium. The circulation is increased by stimulants such as haschish and opium and this promotes the reproduction of impressions. In somnambulism usually after the attack there is no recollection of what has been done but in each crisis there is recollection of preceding crises.(b) Instances of hypermnnesia in the hypnotic state are given by the authors of Animal Magnetism who, further remark “ the acuteness of the memory during somnambulism without absolutely justifying those who assert that nothing is lost to memory yet shows that its *conservative* power is much greater than is supposed, when measured by the capacity of reproduction or recollection. It proves that in many cases in which we believe that a certain fact is completely effaced from the memory, this is by no means the case ; the trace of it is there, but the power of recalling it is wanting ; and it is probable that under the influence of hypnotism or of some excitement to which we are sensitive, it would be possible to revive the apparently extinct memory of the fact in question.”(c) So also Professor James concludes as the result of certain pathological evidence of brain-diseases and hypnotic cases : “ All these pathological facts are showing us that the sphere of possible recollection

---

(a) James, *op. cit.*, Vol. II, p. 563.

(b) Ribot, *Diseases of Memory*, Edn. 1885, pp. 175—177 & 192 sq.

(c) Binet and Féré, *Animal Magnetism*, pp. 136-7.

may be wider than we think, and that in certain matters, apparent oblivion is no proof against possible recall under other conditions.”(a) Professor Sully’s remarks on the same point also deserve quoting: “ The stage of complete obliscence is supposed to be reached when no effort of will and no available aid from suggestive forces succeed in effecting the reproduction. In order however to determine that a fact is thus irrecoverably forgotten, we ought first to have tried the maximum force of the reproductive agencies and this is often out of our power. The addition of the stimuli of locality, sound of voice and so forth, might serve to recall images of persons which are now apparently irrecoverable. The remarkable revival of remote and seemingly lost impressions in dreams and in certain forms of brain-derangement suggest that much which we suppose to be forgotten might, *under the most favourable conjunction of conditions*, be recovered.”(b)

We wish we had space to quote here some of the pathological evidence in question, as it would certainly convince doubters that abnormal powers of memory have been displayed under such conditions ; and, if this be so, in view of the fact that we cannot, in the present state of our knowledge, define the conditions of its display, we should have more hesitation in classing as impossible what appear to be abnormal recollections under ordinary circumstances.

5. The subject of association of ideas by contiguity and similarity will be explained more fully in paragraph  
**Revival of Memory.**

6. Here we desire to say a few words concerning it in connection with Revival. It is not always necessary to have a pathological condition in order to revive a seemingly forgotten memory : much may be done by association of ideas by contiguity in space. “ Who has not,” says Ribot, “ in order to recover an impression momentarily lost, made his way to the spot where the idea first arose in order to place himself as far as possible in the same material situation, and at length find it suddenly revived ? ”(c) Some readers will remember that such an experiment was made in Wilkie Collins’ story “ The Moonstone.” Now particularly is this required in the case of recognition of per-

---

(a) James, *op. cit.*, Vol. I, p. 682.

(b) Sully, *op. cit.*, p. 215.

(c) Ribot : Diseases of Memory, p. 180.



sons : such recognition often does not come of itself through the simple fact of their presence. It must be suggested, or rather aided by actual impression of the circumstances in which they are commonly presented. Recollection of places fixed by long experience becomes almost organic and serves as a starting point for the excitation of other remembrances. Hence recollection of the person follows, as it depends upon a very stable form of association, namely, contiguity in space. The surviving category of recollections aids in the revival of others, which, if left to themselves, would have remained inactive.(a)

This fact is often entirely overlooked when it is sought to test an identification by placing one person among a number of others in new surroundings, and calling on the witness to pick him out. If the witness succeeds, a correct identification in such circumstances would be a strong corroboration of the truth of the recognition. But if he fails, it does not prove that he could not have identified the person if placed in the original surroundings in which he was first seen by the witness. It would be far better to test the recollection of the witness by showing various persons separately, each dressed in clothes similar to those which the offender is believed to have worn at the time of the occurrence, in the actual locality in which the witness states he saw him.

Nor again, because a witness once says that he cannot recollect a person or an event, does it follow that he will not do so afterwards at another time or under other circumstances. According to the author's experience, as evidence is at present received, it is quite sufficient for a man to have failed once to recollect, to be discredited instantly, if he subsequently professes to remember. Similarly, if a witness says just after the event that he will not be able to identify the man, if he sees him again, an altogether exaggerated importance is attached to such a statement. It is argued that if he could not recognise the man when the facts were recent, he could not possibly do so at a later stage. We venture to assert that such opinions are wrong and merely due to ignorance of the nature of memory. They do not take into account the effect of inhibition

---

(a) *Ibid.*, pp. 148-9.



in preventing revival : a recollection may fail to come, not because it has faded from the mind and become lost altogether, but because there are associations of other ideas blocking the way. Remove these inhibitions, open the channels of discharge for the ideas wanted, and the recollection will be revived. The motor side of the psychical process which regulates the discharges that go from the brain cannot be neglected ; channels of discharge are closed, if action is proceeding in the opposite channel, and ideas which would lead to the opposite action then do not develop but remain inhibited.(a)

Even if the process should not be exactly that described above, it has long been recognised that old associations become suppressed by newer ones, and if these are temporarily disorganised and the field is left free, the most stable, that is to say, the longest formed associations return. This is the explanation why memories of youth return in old age or when any form of mental dissolution begins : the acquisitions of youth come into prominence because there is nothing left to interfere with their freedom of action. Ribot, after instancing some astonishing revivifications of events in early life, to the question whether we should infer that absolutely nothing is lost upon the memory, replies :—" It is possible that certain cellular modifications and dynamic associations are too unstable to last. But we may at least say that persistence, if not absolute, is the general rule and that it includes an immense majority of cases."(b)

Let this view be once grasped, namely, that the recollections are there all the time only waiting to be revived by the removal of something which suppresses or inhibits them, and it is no longer even improbable that a person should remember later what he failed to recollect before, or what he anticipated he could not recover. As to how such removal is probably effected the following description will give some idea. It is not infrequent that when we cannot remember a name, we think of something else and the name comes of itself. When we try to remember the name a large number of neuron processes set in, which normally lead to the excitement of the particular process which furnishes the memory image of the name. But those

---

(a) H. Munsterberg : *Psychotherapy*, pp. 46—50.

(b) Ribot, O. C., pp. 183—6.

brain cells may not respond, the channels may be blocked somehow or the excitement of those cells may be lowered. Now new excitements engage our psycho-physical system. We are thinking of other problems. In the meantime by the new equilibrium in the brain, the blockade in these first paths may slowly disappear, or the threshold of excitability may be changed. The physiological excitement may now be carried effectively into those tracts. The cell response sets in and suddenly the name comes to our mind.(a)

Elsewhere the same writer describes how by asking questions by which associations of ideas connected with the point wanted are suggested to the witness, facts may be brought to light which even the person himself is ignorant that he knew. As soon as a number of associations have been produced under pressure of the desire to associate as quickly as possible, the mind enters into a state of decreased inhibition in which suppressed and forgotten ideas rush forward.(b) The nature of this questioning process will be described later: the passage is here cited to show that a witness does not always know what he can remember, and also because it illustrates one way in which inhibitions of memory can be overcome.

Not merely does a witness sometimes say wrongly that he cannot or will not be able to remember a person or fact, but he will also be equally mistaken when he asserts positively that he can or has remembered something. It has been proved by experiment that the subjective feeling of certainty is no proof of the truth of the recollection. Three pictures rich in detail, but well adapted to the interest of children, were shown to a large number of boys and girls, who looked at each for fifteen seconds and then wrote a full report of what they could remember. They were then asked to underline those parts of their reports of which they felt so certain that they would be ready to repeat them on oath before a court. The result showed that there were almost as many mistakes in the underlined sentences as in the rest. The experiment has been repeated, and it is found that the same happens in a smaller but still surprising degree in the case of adults also. Further experi-

The subjective  
feeling of certainty  
as to recollection.

not or will not be able to remember a person or  
fact, but he will also be equally mistaken when he  
asserts positively that he can or has remembered

(a) Munsterberg, O. C., pp. 144-5.

(b) Munsterberg: Psychology and Crime, p. 106.

mental investigation revealed that this subjective feeling of certainty not only obtained in different degrees, but has, with different individuals, quite different mental structure and meaning. For one type, certainty in the recollection of an experience would rest largely upon the vividness of the image ; for another type, it would depend upon the congruity of the image with other previously accepted images. Yet again, it appeared that this feeling of certainty stands in no definite relation to the attention with which the objects are observed. If we attend strongly to certain parts of a complex impression, we may yet feel in our recollection more certain about those parts of which we hardly took notice than about those to which we devoted our attention. The correlations between attention, recollection and feeling of certainty become the more complex the more we carefully study them. After reciting the above facts, Prof. Munsterberg remarks :—" Not only the self-made psychology of the average jury-man, but also the scanty psychological statements which judge and attorney find in the large compendiums on Evidence fall to pieces if a careful examination approaches the mental facts." (a)

The sources of such mistakes will be discussed under our heading " Illusions of Memory : " here we wish to point out the bearing of such facts on charges of perjury. It is generally considered that a witness pledges himself to the correctness of any statement which he is prepared to make on oath, and that, unless he is so certain of it as to amount to a guarantee of its truth, he ought to abstain from making any statement at all on the point. Hence witnesses are sometimes reminded that they are on oath in order that, if they are not really certain of something, they may hesitate to say it. It is also not uncommon similarly to remind a man whom it is proposed to prosecute hereafter for perjury, to give him a chance of retiring from what he has said. S. 191 of the Indian Penal Code prescribes as one antecedent condition for such a prosecution that the witness must have been legally bound by an oath. The notion underlying this and the practices referred to, is that the feeling of certainty of the correctness of a fact and the truth of such a statement are, or ought to be, practically identical in value.



A witness who pleads mistake of memory in answer to the charge is rarely listened to, particularly if it was seen that he was cautioned at the time. But if, as has been shown above, the feeling of certainty is not a guarantee of the ability to remember truly, it is clear that such a defence should be weighed carefully before it is rejected ; indeed it might well in some cases be made the subject of a psychological examination of the nature alluded to in paragraph 3.

6. It is not necessary however to appeal to pathological evidence to explain sometimes how it can be that a man may honestly recollect after stating his inability to do so, for we are often able to identify an object, as a face, when we actually see it, without having any corresponding power of imaging it when it is absent. The lower animals which have at best only a rudimentary power of imaging, often display a marvellous power of recognising.<sup>2</sup>(a)

Power of imaging  
in memory.

This important point is not sufficiently understood : it is a common practice to ask a witness to describe a person, an article of jewellery or clothing, &c., before he or it is shown to him, and, if he fails to give an accurate description beforehand, to regard it as a proof that the identification is not genuine. No doubt such a description would be a valuable confirmation of his statement, but the failure to give one may plainly be no proof of its falsity, being simply due to the lack of power to visualize, concerning which we have already spoken.

In the absence of such power it is not plain how such a description could be expected, and indeed the expectation seems to betray some ignorance of the process of memory, which is also illustrated by the following examples. The writer remembers a High Court judge remarking in a dacoity case in which a woman professed to have identified one of the dacoits who was previously a stranger to her, that he did not believe her for one reason because she had not said at the time of the dacoity that she would be able to recognise any of them : and yet had she made the statement he desired it would have been quite worthless. For in memory we only know retention through the fact of revival : what this woman perceived at the

Necessity of an  
exciting cause.

time was subsequently reproduced under the new form of an image, and the immediate condition of the appearance of the image was the recurrence in some form of that mode of central excitation which conditioned the original impression. But this learned judge wished the poor woman to say beforehand what she would not know until the cause capable of exciting the image had been presented to her.

In a second case, *viz.*, one of kidnapping in which a mother was testifying as to the age of her daughter the advocate for the defence questioned her as to whether she could remember the names of any other children who were born in her village in the same year which she could not do. Now in the first place we remember what we are interested in, and the woman was presumably not interested in the other children, but apart from this the cross-examination was conducted on a totally wrong principle so far as memory was concerned : for the woman's daughter was present in court and she was thus an exciting cause to revive the impressions in the mother's brain, whereas the advocate neither produced any other woman from the village nor even mentioned her name, so that there was no reason why the witness should remember anything about anyone else. He simply ignored the fact that there is needed in ordinary cases the presence of something to remind us of the object, or to suggest it to our minds.

The same case further leads us to note the importance of familiarity as an aid to memory : here we have both interest and repetition combined. "What we can recollect instantly and without conscious effort, is either included in, or firmly attached to, our permanent surroundings, dominant interests and habitual pursuits. Thus we can at any time recall without effort the scenery of our home, or place of business, the sound of a friend's voice, the knowledge we habitually revert to and apply in our daily actions, our profession and our amusements." (a) This no doubt is generally known, yet in spite of it, many Magistrates will entirely refuse to accept the identification of his paddy by a cultivator who has grown it or of his jacket or cooking pot by a villager, although these are to him

Remembrance of  
familiar objects.

articles of most familiar use : to the Magistrate, because there are no associations of ideas connected with these things in his mind, they cannot be identified in the absence of some distinct mark, and he has not sufficient imagination to put himself in the villager's place.

Since so much importance is usually attached to the existence of marks as aids to memory, we must devote a few words to this subject. Psychologically considered such marks are merely reasons for the recollection, and it seems a legitimate question why do we always want a reason, *i.e.*, something intermediate, as an explanation of memory ? If a man recognizes a coat he must mention a mark, if he recollects a date he must mention some approximate event to prove it, &c. But why again does not the same feeling recur as to the mark, event, &c., and so on, *ad infinitum* ? To understand this it is necessary to grasp the theory of association of ideas by similarity and contiguity, and the explanation of what is known as the feeling of Recognition.

There are two fundamental forms of connection between ideational elements, connection by likeness and connection by contiguity, and both are concerned in every case of actual association. There is a direct connection of like elements of different ideas, one recalls the other, and then a connection attaches itself immediately to this of such elements of previous ideas as have been externally contiguous to those like constituents : if, as we look at the total result, the connections of the like elements are predominant, we speak of a similarity association, if the external connections are the stronger, of a contiguity association.(a) In cognition the presented and the memorial elements combine at once to a single idea, referred to the actual impression, and from cognition Recognition is developed as follows. In immediate recognition we are either unconscious or but obscurely conscious of the connecting links by whose aid recognition is effected : we may be merely conscious that we have had the idea before without there being any recollection of the attendant circumstances, or, although the recog-

---

(a) Wundt, Human and Animal Psychology, pp. 296, 297. (The writer is aware there are other explanations of association of ideas, but he cannot discuss them in a work like the present.)



nition is immediate, we may also recall the temporal relations and special surroundings in which we previously made the acquaintance of the recognized object. Now it is only when we consciously localise the recognized idea in time and space that we get the feeling of recognition; the act of recognition requires these contiguity connections for its completion.(a)

Immediate recognition furnishes the transition to mediate recognition, where we are clearly conscious that recognition is brought about by the mediation of secondary ideas, such as the marks, events, &c., spoken of above. On this point we will quote Wundt's words: "Think how often you meet a person whom at first sight you take to be an absolute stranger. But he tells you his name, and on a sudden the face that was so unfamiliar shows you the features of an old acquaintance. Or there may be other mediating circumstances. You see a third person whom you have often noticed in his company, and your eyes chance to fall on a coat or a travelling bag that awaken your memory. Here again there is a special feeling regularly associated with the act of recognition. This feeling comes later and arises more gradually than the immediate recognition feeling. At the same time you will find that it may be very vivid even when the apprehension of the agreement between the present idea and previous one is still quite indefinite."(b)

Now Wundt's view is that in every case of recognition, mediate or immediate, secondary or auxiliary ideas are in fact employed, but in the former case they are perceived first and the agreement of the two principals afterwards, while in the latter they are perceived at the same time only as the agreement of the principals or even later: but in every instance the *feeling* of recognition depends upon the excitation of auxiliary ideas.(c)

The importance of marks, proximate events, &c., as auxiliary ideas producing the feeling of recognition is thus plain, and it is not necessary to go back and seek again further marks or events to confirm these, because as soon as we have by their aid consciously localised the past impression in time and space, we have

---

(a) Wundt, *Human and Animal Psychology*, p. 298.

(b) *Ibid.*, p. 299.

(c) *Ibid.*, pp. 300-1.

got the feeling of recognition that we require and are satisfied. Professor Sully gives the physiological explanation of this feeling thus: "when a particular central element or cluster of elements is re-excited to a functional activity similar to that of a previous excitation, this new excitation is somehow modified by the residuum of its previous activity or surviving 'psychological disposition.' This modification is the only assignable nervous substrate of the consciousness of familiarity or recognition." (a)

We must, however, insist that reasons for recollecting events cannot always be given, and it is dangerous to press native witnesses for them, as it only results in their inventing some transparently fictitious explanation, which tends to discredit them unnecessarily. There is nothing strange, as some advocates seem to think, in witnesses recollecting some events and not others, for our memories restore to us only fragments of our past life and often what now seem to us only insignificant details of a scene or incident: as the above quoted writer says: "It seems quite impossible to account for these particular revivals, they appear to be so capricious. When a little time has elapsed after an event and the attendant circumstances fade away from memory, it is often difficult to say why we were impressed with it as we afterwards prove to have been. It is no doubt possible to see that many recollections of our childhood owe their vividness to the fact of the exceptional character of the events; but this cannot always be recognized. Some of them seem to our mature minds very oddly selected, although no doubt there are in every case good reasons, if we could only discover them, why those particular incidents rather than any others should have been retained." (b) One reason, however, is suggested by Prof. Höffding's remark that 'that which has escaped the memory may still indirectly through its after-effects exercise a great influence on our conscious life, but is no longer a part of it.' Nor is it strange that we should be able to remember an event without being able also to assign a positive reason for our recollection, if we understand the nature of nascent or implicit revival. Past experience

**Futility of always  
demanding reasons.**

---

(a) Sully, *Outlines of Psychology*, p. 106.

(b) Sully, *Illusions*, pp. 262-3.

sometimes works in a way which may be called *implicit*: that is to say it is not recalled in detail itself but it invests the details which actually are presented at the moment with a certain relational significance, a sense of their meanings and bearings. This relational import is due to the preformed associations and to the place of the presented details in a context. Such implied revival enters in all recognition of a whole through some partial feature of it, and, in general, the pre-acquired knowledge which determines our present thought is only to a relatively small extent present to consciousness in distinguishable detail. To a far larger extent is it operative implicitly. We are thus conscious of the significance which determines the recognition, but as we cannot call to mind the details which constitute this significance neither can we describe them, or in other words, we cannot assign an explicit reason. For it is sometimes impossible to describe the resultant effect of previous experiences which are not at the moment present to the mind in detail, yet these experiences constitute the wider group of which the object given in detailed experience is apprehended as a fragment.(a)

7. We have spoken above of mediate and immediate recognition, and we shall now discuss further the relation of memory to inference. With reference to this we should like to quote the following

Memory and inference.

passage:—"A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences."(b) Those authors apparently hold that recollection does not involve inference, an opinion which we believe to be erroneous as will appear in the course of this discussion.

Professor Sully, speaking of immediate knowledge, says "and it will be found that even with respect to memory, when the remembered event is at all remote the process of cognition approximates to a mediate operation, *viz.*, one of inference." (c)

---

(a) Stout, *Groundwork of Psychology*, pp. 67-8.

(b) Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act, p. 852.

(c) Sully, *op. cit.*, p. 16.



Binet after stating that there is no well-defined distinction between a perception-recollection and a perception-reasoning, quotes Professor Sully (*Illusions*, p. 235) ‘ in both cases there is a reinstatement of the past, a reproduction of earlier experience, a process of adding to a present impression, a product of imagination taking this word in its widest sense. In both cases the same laws of reproduction or association are illustrated ; that is to say an association of resemblance followed by an association of contiguity . . . . and our state of mind in recognising an object or person is commonly an alternative between these two acts of separating the mnemonic image from the percept and so recalling or recollecting the past, and fusing the image and the percept in what is specially marked off as recognition.’ He then proceeds : “ In what respect does a recollection differ from a reasoning ? This is difficult to determine. We grasp the analogies between these two acts much more easily than their differences. All that the most attentive observation teaches us is that sometimes the suggested image is projected and localized in the panorama of the past, of which it appears to be a fragment, and sometimes it is referred to a present object, and throws off the character of oldness, so as to appear actual.”(a)

When, therefore, we say a witness is guessing and does not really recollect, can we truly distinguish ? Are not both processes alike, in following out association of ideas ? Binet indeed traces the origin of memory to reasoning on the following grounds : “ Memory as a vision into the past offers less utility than reasoning ; we have more frequent need to look before than behind : it is a kind of intellectual refinement to contemplate the things of the past as past, and without making them serve in the explanation of present facts. Therefore, it seems to us probable that memory is not a primitive but a superadded fact ; it has sprung from reasoning at a time when the struggle for existence became less imperious.”(b)

Similarly, Mr. Bradley holds that recollection implies inference for he says : “ Memory is plainly a construction from the ground

---

(a) Binet, *Psychology of Reasoning*, p. 176.

(b) *Ibid.*, p. 178.

of the present. It is throughout inferential, and is certainly fallible," (a) and again speaking of the double aspect of memory, "We remember, on the one hand, because of prior events in our existence. But, on the other hand, memory is most obviously a construction from the present, and it depends absolutely upon that which at the moment we are." (b) Memory then involves inference and it is unwise to lose sight of this as it helps to explain one way in which error may creep into recollection. We would allow that there would be a difference between an impression formed at the time of the occurrence and subsequently recalled and one constructed for the first time by inference long after the event. Possibly this is what the commentators mean, but, if so, it appears to us doubtful whether an impression could be formed by inference in this manner. For "impression" as here used seems to be equivalent to the general result of the conversation, and, if it is general in its nature, it would seem that it must be obtained at the time of the occurrence in the manner described elsewhere. (c) At all events, if it could be constructed later, it would, we conceive, only be through reviving the whole or part of the original conversation as the datum from which inference would work and thus might equally well be treated as a recollection. We think that most witnesses would be much puzzled if they were asked to swear that their impression of a conversation was a recollection and not an inference or *vice versa*, both because of the difficulty of discriminating between the two in the first instance and because of the likelihood of their becoming confused later (if such a discrimination had ever been made) when they tried to recall the impression.

But this is not our only objection to the passage in question: there appears to lie at the root of it a fallacious idea that impressions are not to be accepted as evidence because less trustworthy than statements of recollection of facts. Yet we never do under any circumstance reproduce all that has happened and we intentionally forget much that we see and hear, for it is only by omitting some details that we can recall what we want. What memory gives us

---

(a) Bradley, *Appearance and Reality*, p. 257.

(b) *Ibid.*, p. 356.

(c) Chapter XIV, para. 6.

is always an impression, or, as Professor Stout calls it, a generic image. " We simply make an outline sketch in which the salient characters of things and events and actions appear, without their individualising details. Mere forgetfulness in part helps to make this possible : but the generic image is an immense assistance. If I picture myself as eating my breakfast at the beginning of the day, it is enough to have a generic image of the breakfast-table and of myself sitting at it and possibly of the food presented to me. I pass over the details connected with the arrangement of the breakfast-table and the succession of particular incidents which took up the half hour spent in eating. Hence, it is possible for me to recall the whole event of taking breakfast, which occupied half an hour, in the fraction of a minute, and then pass on to something else." (a)

It is thus idle in the sphere of memory to seek for anything better than impressions, and if we are to discredit these we must discredit all.

8. There are various ways in which the memory can be assisted. When an actual impression cannot be repeated, its reproduction will to some extent have the same result : thus we can keep the images of remote experiences from disappearing by periodically reviving them, as when children talk with their parents about common experiences of the past. (b) " Through the cumulative effect of mutual reminder, incident after incident returns, adding something to the whole picture till it acquires a degree of completeness, coherence and vividness that render it hardly distinguishable from a very recent experience. The process is like looking at a distant object through a field-glass. Mistiness disappears, fresh details come into view, till we seem to ourselves to be almost within reach of the object." (c)

Now looked at as a revival of memory it may be a valuable thing for witnesses to talk over their experiences with one another before giving evidence : but this aspect of it is entirely left out of account in the view which is usually taken of it. Its sole

---

(a) Stout, *Analytical Psychology*, Vol. II, pp. 184-5.

(b) Sully, *Outlines of Psychology*, p. 177.

(c) Sully, *Illusions*, pp. 259-60.



object is always taken to be to concoct together a story which each will tell consistently, and if a witness admits in the box that he has talked over the matter with another witness before entering the court he is as often as not considered unreliable merely on that account. We do not wish to maintain that no evidence is concocted or that it is never concocted in this manner, but we do protest against such a view being invariably taken, and we suggest as an alternative that talking over the occurrences beforehand may sometimes by reviving the memory render the evidence given not less but more reliable.

It is noted, however,(a) that, though by comparing recollection we may reach a rough average recollection which will be free from any individual error, there is a danger attached to it. There may be a cause of illusion acting on all our minds alike, as *e.g.*, the extraordinary nature of the occurrence which would pretty certainly lead to a common exaggeration of its magnitude, and this process of comparing recollections affords an opportunity of reading back a present pre-conception into the past.

It has no doubt been frequently noticed that it is easier to recall events in the order in which they occurred, and that witnesses, if left to themselves, habitually narrate occurrences in chronological order: it has always struck the writer that the method usually adopted by Public Prosecutors of asking questions, though it may be useful in excluding irrelevant matter, is certainly calculated to hinder memory. What may appear to be irrelevant according to the Evidence Act may in fact be a necessary link in the association of ideas of the witness, and if closely examined will often be admissible under s. 6 or one of the following sections of the Act. Dr. J. Ward has explained the order of recall as follows: "In a series of associated presentations *A, B, C, D, E*, such as the movements made in writing, the words of a poem learned by heart or the simple letters of the alphabet themselves, we find that each member recalls its successor but not its predecessor.....*B* recalls *C*, why does not *C* recall *B*? We have seen that any reproduction at all of *A* or *B* or *C* depends primarily upon its having been the object of special attention so as to occupy at least momen-

---

(a) Sully, Illusions, p. 292.

tarily the focus of consciousness. Now we can in the first instance only surmise that the order in which they are reproduced is determined by the order in which they were thus attended to when first presented."....." This connexion of association with continuous movements of attention make it easier to understand the difficulty above referred to, *viz.*, that in a series *A, B, C, D,.....* *B* revives *C* but not *A*, and so on, a difficulty that the analogy of adhesiveness or links leaves unaccountable."(a) He further explains that these movements of attention come in the end to depend mainly on interest, but at first appear to be determined entirely by mere intensity.

Similarly Professor Sully says that in recall we renew the original order of the successive adjustments of attention, and he further notes that the action of attention on the order of revival is further illustrated in the selection under the lead of interest of a particular group from among a multitude of impressions, as when we successively fix the eye on certain interesting details of a landscape, the river in the foreground, the mountains in the background, &c., and afterwards recall these in the original order.(b)

**Corroboration and Repetition.**

These remarks explain the value of one form of corroboration of evidence in which the repetition of a statement lends force to it by its consistency. Although this is recognised in the law (s. 157, Indian Evidence Act) it does not seem to be realized by the commentators that consistency is valuable as a mark of truth because it implies the recollection of an event which has really taken place. They seem to regard it somehow as a test of the disposition of the deponent to speak the truth. Thus Messrs. Ameer Ali and Woodroffe write :—" The force of any corroboration by means of previous consistent statements depends upon the truth of the proposition that he who is consistent deserves to be believed. The corroborative value, however, of such previous statements is of a very varying character dependent upon the circumstances of each case,

---

(a) J. Ward, Art. Psychology, Encyclopædia Britannica, 9th Edn., Vol. XX, p. 61.

(b) Sully, Outlines of Psychology, p. 182.

and a person may equally persistently adhere to falsehood once uttered, if there be a motive for it.''(a)

A person may no doubt adhere to a falsehood, but it is not equally easy to repeat a true story and a made-up one, and the longer and more detailed it is the harder it becomes. This follows from the nature of memory itself : events that have really happened will always be recalled in the same chronological order because that is the order in which we originally attended to them, and cross-questioning is not so likely to confuse that order. With a story learnt off by heart it may easily happen that the same question put in different forms and in different contexts will not receive the same answer, for it is not based on any firm association of ideas, as in the case of ordinary memory. Real events are also better recollected because we localise them in time and space and so give them definiteness, assigning them a particular place in our past experience. It would seem that conditions favourable to memory such as interest, attention, impressiveness of the original experience, its intensity and distinctness, duration in the happening, &c., are less likely to be present in the mere learning of a tale than in the occurrence of facts, and hence retention and revival will become more difficult.

The statement then that a 'person may equally persistently adhere to falsehood once uttered, if there be a motive for it,' if by 'equally' is meant 'equally successfully,' is open to criticism on the basis of memory. It has always seemed to us that for this reason a statement does gain value by repetition if the second statement is substantially in accord with the original, and especially if it has stood the test of cross-examination. For a good cross-examination will by suggesting other mental associations be likely to break down the association of ideas in the mind of the witness unless that association has some basis in reality ; if it fails to do that, there is reason to think the story has a foundation of fact. To apply this view to what has become an axiom with the lawyers, *viz.*, that 'the statement of an accomplice does not at all improve in value by repetition' (b) we are inclined to dispute this if proper attention is to be paid to consistency.

---

(a) Ameer Ali and Woodroffe, O. C., p. 892.

(b) *Ibid.*, p. 894.



As there seems to be some confusion in the reasoning here we desire to quote more at length. It is said (*ibid.*) : “ The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and reliable source ; and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The statement of the accomplice whether made at the trial or before the trial, and in whatever shape it comes before the Court is still only the statement of an accomplice, and does not at all improve in value by repetition.”

Now whether the previous statement of the accomplice is a *sufficient* corroboration of his evidence at the trial or not, is a question of fact to be decided in each case, and we have little doubt that in some cases it may be so : but however this may be, it is a different matter from the question whether the statement gains at *all* in value from repetition. It gains to just the same extent as that of the evidence of a non-accomplice witness gains, neither more nor less, because consistency is the test here and not the moral character of the witness : and to say that it does not improve in value because it ‘ is still only the statement of an accomplice ’ is simply to fail to grasp the principle on which the idea of corroboration in s. 157 of the Act is founded. It is just one of those dicta that will not bear examination, but because it has never been examined but has been repeated with parrot-like fidelity by legal writers it has come to be regarded as an axiom instead of being rejected as fallacious.

It is highly important to allow a witness time when giving his evidence, not merely because hurry causes him to say what he may not really intend, but because of the actual process by which we recall a forgotten thing, which Professor James describes thus : we recollect the general subject to which the thought relates : the thing is a gap in the midst of other things. We then think over the details and from each detail there radiate lines of association forming so many tentative guesses. Many at once are seen to be irrelevant. These added associations arise independently of the will by a spontaneous process, and our will lingers over those which seem pertinent and ignores the rest. Then the accumulation

of associates becomes so great that the combined tensions of their neural processes break through the bar, and the nervous wave pours into the tract which has so long been awaiting its advent.(a)

Memoranda for the purpose of refreshing memory are of course admissible both in the English and Indian law under certain circumstances(b) which is no doubt due to the power of words to call up mental images : this being so, the decisions in English law prohibiting the witness from using a copy of a memorandum made by himself seem to be due to a confusion of ideas. In so far as the document is used for the purpose of refreshing memory, there seems no reason to suppose that a copy would not be efficacious in reviving the recollection, and as it is not the accuracy of the document to which the witness swears but to the revived recollections, it is surely immaterial whether the original or a copy is used, if either serves this purpose. Although the Indian Evidence Act allows the use of a copy, it is only provided that there is sufficient reason for the non-production of the original, which we must pronounce a vexatious and needless restriction : even if it could be shewn that the original was more adapted than the copy to revive memory, and we have never seen this point even discussed in any commentary on Evidence, that would be no reason for rejecting the copy in the absence of anything better, at least if the object of the law really is to discover the truth and not blindly follow sets of technical rules framed by persons ignorant of psychology. Now, that it is not the actual handwriting of the document that recalls the events is the accepted opinion of the law, whether right or wrong, inasmuch as it is said that if the witness has become blind, the paper may be read over to him for the purpose of exciting his recollection,(c) and it has been held in America that where a paper is signed with the mark of a witness who cannot read or write, it may be read over to him for the same purpose.(d) Again, experts may refresh their memory by refer-

---

(a) James, *op. cit.*, Vol. I, pp. 585-86.

(b) Best on Evidence, p. 208 ; Indian Evidence Act, s. 159.

(c) Taylor on Evidence, § 1410.

(d) *Commonwealth v. Fox*, 7 Gray (Mass.), 585 (Amer.), quoted on p. 898 of Ameer Ali and Woodroffe, Indian Evidence Act, 5th Edn.

ence to professional treatises, which are printed matter, and there are rulings to the effect that in order to be useful for the purpose of refreshment a document need not be admissible itself as independent evidence.(a) We can, therefore, only attribute this restriction to a confusion between reviving recollection and swearing to the accuracy of a recorded past transaction, &c., on the strength of a past recollection which is not revived, two entirely different matters, which are, moreover, separately provided for in s. 159 and s. 160 of the Indian Evidence Act.

9. Feeling as interest clearly influences and determines what we attend to and hence what we remember, and we shall have more to say on this point under the head of Prejudice. It is with the revivability of the emotions that we are here concerned. It is easier, says Höfding, to recall ideas than the feelings which accompanied them. We can recall images and situations from the past but only most imperfectly the moods which animated us. We more easily recall the alternations and successions of feelings than the feelings themselves. Feelings are remembered by means of the ideas with which they were originally linked and in conjunction with which they composed a certain conscious state. This is a simple consequence of the slower movement of feeling : the thought returns in an instant. A hindrance will always be given in the feelings which prevail at the moment, and this will at all events modify the earlier feeling.(b)

Still we can produce new griefs and raptures by summoning up a lively thought of their exciting cause, and though the cause is now only an idea it produces the same organic irradiations, or almost the same, which were produced by its original, so that the emotion is again a reality.(c) This explains why the narrative of a genuine witness is lively compared with that of a false one, who is unable to summon up even the reflection of an emotion of which he never experienced the exciting cause : for it is exceedingly difficult to imitate emotions because of the immense number of parts

---

(a) *Commonwealth v. Fox*, 7 Gray (Mass.), 585 (Amer.), quoted on p. 899, note 8.

(b) Höfding, *Outlines of Psychology*, pp. 241-2.

(c) *James op. cit.*, Vol. II, p. 474.



modified in each emotion. " We may catch the trick," says Professor James, " with the voluntary muscles, but fail with the skin, glands, heart and other viscera. Just as an artificially imitated sneeze lacks something of the reality, so the attempt to imitate an emotion in the absence of its normal instigating cause is apt to be rather " hollow." (a) Feeling also affects our memories in another way : we project our present modes of experience into the past, and paint our past in the hues of the present. Thus we imagine that things which impressed us formerly must answer to what is impressive in our present stage of mental development : we unconsciously transform the past occurrence by reasoning from our present standard of what is impressive.(b) This is well expressed by Mr. Bradley : " Memory depends on reproduction from a basis that is present,—a basis that may be said to consist in self-feeling. Hence, so far as this basis remains the same through life, it may, to speak in general, recall anything once associated with it. And, as this basis changes, we can understand how its connections with past events will vary indefinitely both in fulness and strength. Hence, for the same reason, when self-feeling has been altered beyond a limit not in general to be defined, the base required for the reproduction of our past is removed. And, as these different bases alternate, our past life will come to us differently, not as one self, but as diverse selves alternately. And, of course, these ' reproduced ' selves may, to a very considerable extent, have never existed in the past."(c)

If we reflect on this it would appear to afford an explanation why a person sometimes gives contradictory accounts of the same thing, at all events when some interval elapses between his two statements. This change of memory, as it may be termed rather than obliviscence, might constitute a valid defence to a charge of perjury based on two contradictory depositions : it would certainly be one if the statements related to intentions or opinions or motives of the deponent, for we do not think much about these and do not become aware that they have changed. It would be less so in the case of statements of facts because the mind stereotypes these more

---

(a) James, *op. cit.*, Vol. II, p. 450.

(b) Sully, *Illusions*, p. 268.

(c) Bradley, *Appearance and Reality*, p. 84.

and we have the greater distinctness of sensuous apprehension ; but we can easily conceive of circumstances in which it might be a true defence even here for the cases known to pathologists of double and alternate personalities are after all but exaggerated instances of the same kind of change, and in such persons the past is viewed entirely differently by each personality.

We have a few words to say on loss of memory due to positive causes. The weakness of memory in drunken-

**Amnesia.**                      ness is well known. Violent acts are frequently committed in this state of which no recollection remains and statements of accused persons to that effect are not necessarily false. Chronic alcoholism impoverishes the memory without effacing it altogether. (a) Partial amnesia may result from mere tiredness and in such circumstances a foreign language may temporarily be almost forgotten. An instance of this is quoted by Ribot : " I descended the same day," says Sir H. Holland, " two very deep mines in the Hartz mountains remaining some hours underground in each. While in the second mine and exhausted both from fatigue and inanition, I felt the utter impossibility of talking longer with the German inspector who accompanied me. Every German word and phrase deserted my recollection ; and it was not until I had taken food and wine, and been sometime at rest, that I regained them again." (b) The author has frequently had a very similar experience at the end of a long day throughout which he had been trying cases in the Burmese language and is convinced that it is inadvisable to spend more than a certain number of hours continuously on the bench listening to evidence given in a foreign tongue. It is probable that towards the end of the day the meaning of some of such evidence is missed. Further the same consideration suggests that witnesses should not be examined and cross-examined longer than a certain continuous length of time when they are not giving evidence in their own language. In such a case, if the witness is not very expert in the foreign tongue, he would fail to take in fully the meaning of the questions and the result of his evidence would be interpreted unfairly.

---

(a) Ribot, O. C., p. 191.

(b) Ribot, O. C., p. 144.

Of a different type is the loss of memory in senile Dementia. The first symptom is the impairment of the memory of recent events though the power of reasoning remains unaffected or little affected. Dr. Maudsley says that a man in this state might forget that he had recently had some property left him or that some one whom he had intended to remember in his will had died, and yet might be capable of making a just and rational disposition of such property as he knew he possessed and of doing right to those who were present to his mind. Or after making his will he might forget that he had done so and begin after a short time talking about making another. It need not be that he was constantly changing his mind. There is often an appearance of greater mental aberration than the facts warrant. If the attention is actively aroused by some stimulus and the facts brought clearly to his mind, he will apprehend them and pass a sound judgment on them although a few hours or a few days after he may not, if questioned, be able to give an account of what he has said or done. He may in fact be capable of making a will, though incapable by reason of loss of memory of taking proper care of himself and his affairs. (a)

These observations appear to us important having regard to the excessive weight sometimes attached to the fact that a man has made several wills in a short time in cases in which it is sought to prove that the testator was not of sound mind at the time he made his will.

10. "When I distinctly recall an event," says Professor Sully, "I am immediately sure of three things: (a) that something did really happen to me; (b) that it happened in the way I now think; (c) that it happened when it appears to have happened." Hence, there are three classes of illusion:—(1) false recollections to which there correspond no real events of personal history; (2) others which misrepresent the manner of the happening of the events; (3) others which falsify the date of events remembered. (b)

The first kind is in the nature of hallucinations and concerns imagination, the effect of which on memory has been thus des-

---

(a) H. Maudsley, Responsibility in mental disease, pp. 254—61.

(b) Sully, Illusions, p. 242.



cribed by the same writer. "Not only does our idea of the past become inexact by the mere decay and disappearance of essential features, it becomes positively incorrect through the gradual incorporation of elements that do not properly belong to it. Sometimes it is easy to see how these extraneous ideas get imported into our mental representation of a past event. Suppose, *e. g.*, that a man has lost a valuable scarf-pin. His wife suggests that a particular servant, whose reputation does not stand too high, has stolen it. When he afterwards recalls the loss, the chances are that he will confuse the fact with the conjecture attached to it, and say that he remembers that this particular servant did steal the pin. Thus the past activity of imagination serves to corrupt and partially falsify recollections that have a genuine basis of fact. It is evident that this class of mnemonic illusions approximates in character to illusions of perception. When the imagination supplies the interpretation at the very time the mind reads this into the perceived object, the error is one of perception. When the addition is made afterwards, on reflecting upon the perception, the error is one of memory." (a)

But beside confusing facts with conjectures we may also confuse experiences themselves, and this is a source of many errors. To quote the same writer "the record of memory is being continuously falsified by the effects of time, the loss of certain constituents of the experience, and the confusion of experiences one with another. And to this may be added that, in recalling past experiences, we tend without any clear intention to omit and even to re-arrange so as to suit new circumstances, or gratify a new interest. Thus in various ways, the reproductive process is adulterated by an admixture of sub-conscious production." (b)

Such confusions may usually be traced to association of ideas especially in the case of a misrecollection of dates or the mistaking of persons. How this comes about may be seen from the following. "We might find, *e. g.*, that the two persons were associated in my mind by a link of resemblance, or that I had dealings with the other

---

(a) Sully, *Illusions*, pp. 264-5.

(b) Sully, *Outlines of Psychology*, p. 223.

person about the same time. Similarly, when we manage to join an event to a wrong place, we may find it is because we heard of the occurrence when staying at the particular locality, or in some other way had the image of the place closely associated in our minds with the event. But often we are wholly unable to explain the displacement.”(a)

Such fallacies depend on the adulteration of pure observation with inference and conjecture : there are others due to a rather different cause which has been termed, by Professor Stout, coalescence. Coalescence or overlapping is where an old combination or new combination is relatively so powerful as to overbear the tendency opposed to it without a struggle. It may take place between a new percept and the predisposition left by previous percepts and may also extend to the corresponding memory image, or it may take place between mental images. It produces falsification of memory and perception. Our memory of what has happened becomes modified in accordance with our desires, our view of what ought to have taken place ; this falsification becomes greater in proportion to the lapse of time, hence a narrative written down at once after the occurrence of a fact will be more exact than one written later. So also the gradual transformation of a story as it passes from one person to another, is in part due to coalescence. Each hearer unconsciously modifies it according to his preconceived ideas and transmits it to his neighbours with this added modification.(b) It is of course largely to guard against this that hearsay evidence is prohibited in law. Professor James describes this as one great source of the fallibility of testimony meant to be quite honest : “ The most frequent source of false memory is the accounts we give to others of our experience. Such accounts we almost always make both more simple and more interesting than the truth. We quote what we should have said or done rather than what we really said or did ; and in the first telling we may be fully aware of the distinction. But ere long the fiction expels the reality from memory and reigns in its stead alone.”(c)

(a) Sully, *Illusions*, p. 266.

(b) Stout, *Analytical Psychology*, Vol. I, pp. 286-7.

(c) James, O. C., Vol. I, pp. 373-4.

We suppose that no one will deny that illusions of memory do occur or that memory is often mistaken, but it makes all the difference to what extent this is realised. Certainly some of the questions put by advocates to witnesses and some of the arguments in appeal cases suggest that witnesses are expected to remember far too much and much too accurately, and that contradictions and discrepancies are regarded in too serious a light. The best way of bringing home to readers this fact, *viz.*, that there is too general a confidence in the reliability of memory, will be by giving the results of some psychological experiments made by Prof. Munsterberg. We shall endeavour in this chapter to confine ourselves as far as possible to those experiments which relate actually to memory : in a later chapter we shall refer to other experiments relating to errors in observation. But it is not always possible to distinguish how much of the error is due to a wrong observation in the first place, and how much to a wrong recollection afterwards : both causes may perhaps be said to contribute to what is generally known as the fallibility of memory. Two scenes were rehearsed and then took place before a number of observers who were unaware of this. The first was before students, and they were then asked to write a report of the scene, some at once, some the next day, and some a week later : others deposed to their observations under cross-examination. The scene was in the nature of a sudden quarrel between two students in the lecture room, in which one drew a revolver which went off, and the students reported with reference to both actions and words. Omissions, wrong additions and alterations were counted as mistakes. The smallest number of mistakes gave twenty-six per cent. of erroneous statements ; the largest was eighty per cent. The reports with reference to the second half of the performance, which was more strongly emotional, gave an average of fifteen per cent. more mistakes than those of the first half. Words were put into the mouths of men who had been silent spectators : actions were attributed to the chief participants of which not the slightest trace existed ; and essential parts of the episode were completely omitted by a number of witnesses. The second scene took place before a scientific association of jurists, psychologists and physicians and lasted less than twenty seconds. There was a carnival going on in the streets at the time, and the



scene consisted of the intrusion into the meeting of a clown dressed up and highly excited, followed by a negro with a revolver. Both shouted out phrases in the hall, one fell to the ground, the other jumped on him : there was a shot, and then suddenly both disappeared. The scene was photographed at the time unbeknown to the meeting. The President asked the members to write down at once an exact report, as he felt sure the matter would come before the Courts. Of the forty reports in only one the omissions were calculated as amounting to less than twenty per cent. of the characteristic acts ; fourteen had twenty to forty per cent. of the facts omitted ; twelve omitted forty to fifty per cent., and thirteen still more than fifty per cent. But besides these omissions there were only six among the forty that did not contain positively wrong statements, in twenty-four papers up to ten per cent. of the statements were inventions, and in ten answers—that is in one-fourth of the papers—more than ten per cent. of the statements were absolutely false, although they came from scientifically trained observers.

Only four persons among forty noticed that the negro had nothing on his head : others gave him a Derby, a high hat, etc. A red suit, a brown one, a striped one, a coffee-coloured jacket, shirt sleeves, and similar costumes were invented for him. He wore in reality white trousers, a black jacket and a large red necktie. The Scientific Commission which reported the details of the inquiry came to the conclusion that the majority of the observers omitted or falsified about half of the processes which occurred completely in their field of vision. Judgment as to the time duration of the act varied between a few seconds and several minutes.(a)

Of course all these mistakes cannot be attributed to memory. The sources of error begin before the recollection sets in. The observation itself may be wrong and judgments may misinterpret the experience. Suggestive influences may falsify the data of the senses. Of these we shall speak later. Allowing that all these and others contribute, still much will remain to set down to mistakes in recollection, and it is immaterial how much is due to each cause for our present purpose, *viz.*, that of illustrating the extent to which perfectly honest witnesses may err in their accounts of occurrences.

---

(a) H. Munsterberg : Psychology and Crime, pp. 49—53, 56-7.

The idea on which most cross-examination proceeds is that wrong statements are the product of intentional falsehood, whereas it is clear that wrong statements are to be expected in almost any account of a rapid and disturbing occurrence.

Enough perhaps has been now said to make clear the chief sources of error in memory and what in consequence must be looked for in weighing evidence, and at the same time to assist in estimating the value of a defence such as error, lapse of memory, &c., put forward by an accused in a case of perjury.

#### NOTE.

We desire to mention a view of memory which rests perhaps on too metaphysical a conception to include in the body of our text. It depends on the theory of consciousness which has found favour with philosophers, such as Professor James, Dr. F. C. S. Schiller, &c., known as the transmission theory, according to which the human brain is merely a machine for regulating and restraining the consciousness which exists outside it. It does not produce consciousness, but limits it and confines its intensity within certain lines, contracts its manifestation within the sphere which it permits: it is a permanent obstruction to the transmission of consciousness. How this view will apply to memory can be gathered from the following quotation:—"And again if the body is a mechanism for inhibiting consciousness, for preventing the full powers of the Ego from being prematurely actualized, it will be necessary to invert also our ordinary ideas on the subject of memory, and to account for forgetfulness instead of for memory. It will be during life that we drink the bitter cup of Lethe, it will be with our brain that we are able to forget. And this will serve to explain not only the extraordinary memories of the drowning and the dying generally, but also the curious hints which experimental psychology occasionally affords us that *nothing is ever forgotten wholly and beyond recall.*" (a)

The significance for our present purpose lies in the last words: it is a warning against confidently rejecting as untrue statements which appear to involve an exercise of memory beyond the ordinary human powers.

---

(a) See F. C. S. Schiller's *Riddles of the Sphinx*, 2nd Edn., p. 290

## CHAPTER VI.

### ATTENTION—THE SENSES—INTROSPECTION—INFERENCE.

Psychological description of Attention—Movements in Attention—Inhibition—Spontaneous and Voluntary Attention—Determinants of Attention—Interest—Effects of Attention—The Scope of Attention and of Consciousness—Attention and Intention.

The Senses—sensible perceptions not necessarily the same in different individuals—to what extent they may be assumed identical, examples of exceptional powers of the senses in hypnotic, pathological and other states—conclusions to be drawn from these cases.

Introspection—Its difficulties and sources of error—Value of the Introspective method—Insight, how we apprehend others' feelings and thoughts.

Inference—Implicit or unconscious and conscious reasoning—Matter of fact and matter of opinion—false distinctions as to.

Note on the attitude of some persons towards unusual psychological phenomena.

AMONG the conditions on which depends the capacity of a party to give a faithful account of things Best  
Psychological description of Attention. alludes to attention in the following terms:—

“Whether the circumstances he narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself.”(a) This subject has been incidentally treated of in the chapter on memory, and the effects of attention on various mental states are so frequent that constant allusion to it occurs throughout this volume, we shall therefore devote as brief a space as possible to it here.

First, we shall attempt to describe psychologically in what attention consists and this cannot be done in a few words. Attention is not a separate faculty of the mind which acts on the other psychical phenomena, but is the name given to a certain state of consciousness as a whole, and that state is one of monoideism. “The normal condition,” says Ribot, “is plurality of states of consciousness or polyideism. Attention is the momentary inhibition to the exclusive benefit of a single state of this perpetual pro-

---

(a) Best on Evidence, § 22.



gression, it is a monoideism”(a) and again “Attention consists in the intellectual state, exclusive or predominant, with spontaneous or artificial adaptation of the individual.” It is not, however, a complete monoideism; it supposes the existence of a master-idea drawing to itself all that relates to it, and nothing else, allowing associations to produce themselves only within very narrow limits, and on condition that they converge towards a common point.

Similarly Professor James describes it as “the taking possession of the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought. Localization, concentration, of consciousness are its essence. It implies withdrawal from some things in order to deal effectively with others . . . . one principal object comes then into the focus of consciousness others are temporarily suppressed.”(b)

If you try to analyse attention further you get the following factors given by Wundt. Attention contains three essential constituents; an increased clearness of ideas; muscle sensations which generally belong to the same modality as the ideas, and feelings which accompany and precede the ideational change. At the same time the concept of attention proper has no reference to the first of these processes, but only to the last two.

Apperception, therefore, denotes the objective change set up in ideational content, attention the subjective sensations and feelings which accompany this change or prepare the way for it. Both processes belong together as parts of a single psychical event. “Attention in the wider sense is not—and this is the important point—a special activity, existing alongside of its three constituent factors, something not to be sensed or felt, but itself productive of sensation and feelings. No! in terms of our own psychological analysis at least, it is simply the name of the complex process which includes those three constituents. Their nature makes it plain enough why we regard attention as subjective activity, without our needing to assume any special consciousness of activity independent of the other mental elements.”(c)

(a) Ribot, the Psychology of Attention, pp. 4, 6.

(b) W. James, Principles of Psychology, Vol. I, pp. 403—5.

(c) Wundt, Human and Animal Psychology, p. 249.

Great stress is laid by Ribot on the physical concomitants of attention. These consist in movements and he insists that the movements of the face, body, limbs, and the respiratory modifications that accompany attention are not merely effects, outward marks, but necessary conditions, and that if you totally suppress movements you suppress attention. The fundamental rôle of the movements is to maintain the appropriate state of consciousness and to reinforce it, and it is these motor manifestations, together with the state of consciousness which constitute their subjective side, that actually make up attention.(a)

And since attention is said to maintain its state by inhibition it is well to describe here what is meant by this term. “ The fundamental property of the nervous system consists in the transformation of a primitive excitation into a movement. This is reflex action, the type of nervous activity. But we also know that certain excitations may impede, slacken or suppress a movement,(b) *e.g.*, suppression of the movements of the heart through irritation of the pneumogastric nerve. This power of inhibition exists also in the brain, just as we can begin, continue or increase a movement, we can also suppress, interrupt or diminish it ; every act of volition, whether impulsive or inhibitory, acts only upon muscles and through muscles. The mechanism of attention is motor, and in all cases of attention there must necessarily be a play of muscular elements, real or nascent movements, upon which the power of inhibition acts.

Spontaneous attention is natural and devoid of effort, and is produced by some anterior emotional state ; voluntary attention is artificial, caused by the struggle for existence and under pressure of necessity and by education. By means of it an artificial interest is given to things for which men had naturally no liking ; it is a product of civilization and adaptation to the conditions of a higher social life and an imitation of natural attention. It is with spontaneous attention that we shall be chiefly concerned in this chapter.

---

(a) Ribot, *op. cit.*, pp. 19—23.

(b) *Ibid.*, pp. 40—47.

2 Best speaks of the importance of a circumstance either intrinsically or with relation to the observer as the cause of attention. What exactly is meant by the phrase intrinsic importance is not very clear, but we understand him to refer to events which are supposed to interest every one and events which interest the observer only or specially, but at all events it is interest in some form or shape to which he alludes. That we attend to what we are interested in is of course so universally admitted as to be almost a truism ; we only notice such items, and without selective interest our experience would be a chaos.(a) It follows from this that attention will vary with the number and nature of the interests which observers possess. “ We dissociate,” says Professor James, “ the elements of originally vague totals by attending to them or noticing them alternately of course. But what determines which elements we shall attend to first ? There are two immediate and obvious answers ; *first*, our practical or instinctive interests ; and *secondly*, our æsthetic interests . . . . now a creature which has few instinctive impulses or interests, practical or æsthetic will dissociate few characters, and will at best have limited reasoning powers, whilst one whose interests are very varied will reason much better.”(b)

Now it is often laid down as the mark of a false witness that he declines to commit himself to details on which he might be contradicted, falling back on such excuses as that he did not notice, or he does not recollect, &c., and it is not always easy to decide whether such pleas are genuine or not. The details on which he is questioned are really matters, which assuming he were a genuine witness, he might or might not be expected to have noticed according to the interests which he naturally possesses, and it by no means follows that because one witness has observed certain details, others if they were really present, could have done the same, *i.e.*, unless all men have the same interests. It is difficult for the judge and the advocate who are considering the matter after the event, when it has become a subject of special interest to them, to realise that

---

(a) James, *op. cit.*, Vol. I, p. 403.

(b) *Ibid.*, Vol. II, pp. 344-345.



before the existence of the case there was no such cause to excite the interest of the witness, and it is also difficult for them, equipped as they are with certain interests of their own, to place themselves mentally in the position of a man differently equipped, and estimate how much can reasonably be expected from him in the way of attention. It requires both knowledge of the people and natural powers of imagination. It must also be remembered that there are other causes of variations of attention in individuals; thus Obersteiner found that attention generally requires more time in ignorant individuals than in people of culture; in women than in men, which latter by their particular mode of life, have developed the power of inhibition; in old people than in adults and young people; which doubtless must depend on a less rapid function of activity.(a)

Interest is ultimately based on emotion, and the emotional states have their primordial source in the organic vegetative activity. The states designated as needs, appetites, inclinations, tendencies and desires, are the direct and immediate results of every animal organisation and the true basis of emotional life. And so Ribot says "Attention depends on emotional states, these are reducible to tendencies, tendencies are fundamentally movements or arrested movements, and may be conscious or unconscious. Attention both spontaneous and voluntary is accordingly, from its origin on, bound up in motor conditions."(b)

It is then whatever crosses or satisfies these tendencies that interests us; whatever produces in a man an agreeable, disagreeable or mixed state, and the intensity and duration of attention depends on the intensity and duration of the desires, satisfaction, discontent, jealousy, &c. The feelings of pleasure and pain are thus not the causes of attention but signs that certain appetites, tendencies, &c., are satisfied or thwarted, and Prof. Stout denies that interest is the cause of attention, on the ground that it is merely attention considered in its hedonic aspect: they are really coincident, interest, as actually felt at any moment, being nothing but attention itself.(c)

---

(a) Ribot, *op. cit.*, p. 67.

(b) *Ibid.*, p. 111.

(c) Stout, *Analytical Psychology*, Vol. I, pp. 224-5.

Among the determinants of attention are the strength and persistence of an impression, its suddenness, novelty and generally its disturbing character in relation to the pre-existing state of mind.

Other determinants  
of attention.

This is really again the volume and intensity of the feeling it excites, which may be bound up with the idea of past impressions and so revived along with them. But not only novelty but also familiarity is a cause of attention, the circle of established feelings and interests, and especially when we have the old presented in a new setting. (a) Surprise or astonishment is spontaneous attention excited by something new or unexpected, it is an emotion, and it is probable that in it we have imperfect knowledge because we have too much sensation. (b) As remarked, when speaking of memory, emotion up to a certain point is favourable to attention, but "when- ever sensation passes beyond a certain pitch of impressiveness, and especially, when it becomes so intense as to be markedly painful, it disturbs attention and, so to speak, clogs the wheels of thought. This holds good of presentations which are otherwise capable of exciting and sustaining attention . . . in such instances sensuous intensity is hostile to attention, but normally it is of course a condition which favours attention to objects with which the impressive sensations or images are connected. This is so, because, within limits, the stronger the sensations are, the more effective are they in exciting co-ordinated groups of physical dispositions." (c)

3. The effects of attention may be regarded as two-fold ; as

Effects of atten-  
tion.

expectant attention or pre-attention it is a preparatory stage in the course of which the image of an event foreseen or presumed is evoked. The state of monoideism is formed, with the result that the real event is but the reinforcement of the representation already existing. (d) This organic adjustment and ideational preparation shortens re-action-time and accelerates perception.

(a) Sully, *Outlines of Psychology*, pp. 87—92.

(b) Ribot, *op. cit.*, p. 25.

(c) Stout, *op. cit.*, Vol. I, p. 187.

(d) Ribot, *op. cit.*, p. 68.

In its other aspect, it is doubtful whether it actually augments the intensity of sensations, but it increases the clearness of all that we perceive or conceive, and this it does in several ways. It chooses the appropriate states and maintains them, by inhibition, within our consciousness, and so secures a certain persistence in the sensation or idea ; it thus leads to its retention and so secures its reproduction, as described under the head of memory.(a) Again the concentration of attention upon some objects diminishes the intensity of presentation of others in the same field whether the concentration be voluntary or non-voluntary, for our power of attention is limited, and if, therefore, attention is drawn off, by new presentations, it must be at the expense of old ones ; if it is kept concentrated on old ones, new ones cannot gain an entrance into consciousness. It is this redistribution of attention which explains its influence on will.(b)

It also explains, what is important for us, namely, its influence in prejudice. In our chapter on the emotions we speak of this but here we wish to show how it is, in spite of a desire to be impartial, we may fail to be so. It was said above that attention increases the clearness of what we perceive. Now one of the conditions of the clearness of a sensation in consciousness is the presence in consciousness of corresponding, *i.e.*, similar ideas, or the likeness of the incoming sensation to the idea, sensation or image already present in the mind. There must be a likeness between the sensation and the whole circle of ideas dominant at the moment. The permanent adult interests, connate or acquired, are ready to be touched off by a casual stimulus. If then you are already favourably impressed by a theory the facts that support the theory crowd in upon you, while the outstanding facts, those that cannot connect with the trend of consciousness, fail to present themselves. You mean to be impartial and the conditions of attention make you one-sided. Also the stimulus for which we are predisposed requires less time than a like stimulus, for which we are unprepared, to produce its full conscious effect.(c)

---

(a) Ribot, *op. cit.*, p. 59 ; James, *op. cit.*, Vol. I, p. 426; Sully, *op. cit.*, pp. 93-4.

(b) J. Ward, Art Psychology, Encyclopædia Britannica, 9th Edn., Vol. XX, pp. 42 *et seq.* Animal Magnetism, p. 319.

(c) E. B. Titchener, Psychology of Feeling and Attention, pp. 198 & 251.



Further, though attention itself only increases the force of certain sensations in proportion as it attenuates others, in attending to a thing we almost always develop our idea of it, so that the thought of it becomes more and more discriminative and determinate.(a) If, therefore, it cannot be said that attention *per se* distinguishes, analyses, etc., which are processes of intellectual discrimination, we are through attention led to do so.

Considering the admitted importance of attention as constituting one of the main conditions which influence a witness's ability both to observe at the time of an occurrence and subsequently to reproduce an accurate account of it, it is disappointing to find so few allusions to it in the writings on legal evidence.

It is not uncommon to hear it given as a reason for discrediting a statement, that the witness could not possibly have seen or heard all that he professed to have been aware of, his attention being taken up at the time by this or that event, and it is a frequent saying that one cannot attend to two things at the same time. It is therefore proposed to say something as to the powers of attention which the ordinary individual possesses.

**The scope of attention.**

To understand this we must distinguish between consciousness and attention. There are various grades of consciousness down to actual unconsciousness, but we only call it attention when the psychical content is clearly grasped and the mental state is accompanied by a special feeling; other psychical contents are merely apprehended, they are included in the field of consciousness but attention is not concentrated upon them. These latter contents come and go within the field of consciousness but do not advance to the fixation point at which we have attention.(b) Now, the difference between the scope of attention and the scope of consciousness has been measured in the following way:—In any temporal idea those components only which belong to the present moment are in the fixation point of consciousness, and by the use of special instruments it has been found that taking, *e.g.*, rhythmical auditory impressions, hammer strokes, etc., the amount

(a) Stout, Vol. I, p. 127, *op. cit.*

(b) Wundt, *Outlines of Psychology*, p. 229.

of content which can enter into the scope of attention at a given moment is 6 to 12 simple impressions, while 16 to 40 such impressions can enter into the scope of consciousness.

Speaking roughly, therefore, a man can be aware of three or four times as much as he can actually attend to, and it is untrue that he can only receive one impression or one idea at a time.(a)

There is also another subject on which the study of attention appears to us to throw some light ; we allude to the distinction between implicit knowledge and knowledge which is actually present and used by the agent at the time of the act, which was drawn by us when speaking of the ' knowledge equals intention ' presumption of law.(b)

Attention & Intention.

We doubt if any one would accept the proposition that a person can intend to do something to which he does not attend at all, and yet the knowledge which is attributed to him (and therefore the resulting intention) according to the presumption in question, does not necessarily imply attention to what he is supposed to know or intend. " Active intention," says Mr. Bradley, " we may say roughly, is the dwelling ideally on an object so as to do something practical or theoretical to that object or with regard to it "(c) and he regards as the two essential features of attention, *first*, the domination of the idea, and *secondly*, its maintenance before the mind by my activity. Active attention is fixed always by an idea of an end, and this idea is maintained in consciousness, and developed through attention, hence it is that attention implies more than mere knowledge. It is not itself volition but it implies volition, inasmuch as I must do something to support and maintain the ideal object before me. In a case, *e.g.*, where, without pausing to think about my suggested action, I act at once, he denies that there is attention ; (d) " we are to suppose that there is present here an idea of what I am about to do, for without such an idea we should certainly not have volition. But in the case supposed the idea realizes itself forthwith without any further ideal develop-

(a) Ribot, *op. cit.*, pp. 230—3, 236.

(b) See p. 106 ante.

(c) Bradley on Active Attention, *Mind* N. S. No. 41, p. 9.

(d) *Ibid.*, p. 14.

ment, and in such a case we have in the proper sense no attention. I certainly perceive an object, and that object may, as we say, violently strike me, and I may also be dominated and overpowered by the idea of my action on the object, but with all this, if I go on to act at once, I do not actively attend. My attention will under certain conditions, it is true, follow as a consequence, but it has so far had no time in which to develop itself, and so far in fact it is not there.’’

Still less of course would there be attention in the impulsive instinctive type of act in which there is no clear idea at all in the mind, but at the most a general idea of striking, etc., such as we have elsewhere spoken of. It seems to us that when it is realised in what attention actually does consist, and the kind of mental state which it necessarily involves, it becomes apparent that, unless you are prepared to hold that you can have intention without attending to the object of the intention—a proposition little short of a contradiction in terms—it must be admitted that the mental state which is attributed to the agent by means of the legal presumption employed may easily have nothing in common with real intention beyond the fact that they are wrongly described by the same name.

4. A second condition on which depends the capacity of a party to give a faithful account of things is, according to Best, “his powers, either natural or acquired, of perception and observation.” (a) This species of evidence is commonly called ‘immediate’ where the thing comes under the cognisance of our senses, and is usually considered the most satisfactory and convincing. (b) It is also sometimes termed ‘original’ or ‘direct.’ It is proposed, therefore to say something here on the subject of sensation and our senses.

It is not intended to deny that in sense-perception we probably do get nearest to outward reality, and that we have most certainty in this form of intuitive knowledge, but, as Mr. Bradley says, it is impossible always to use actual present sensation as a test of truth, and it is both a strange prejudice that outward sen-

---

(a) Best on Evidence, § 22.

(b) Best on Evidence, §§ 28, 197.



sations are never false, and dull blindness to fail to recognise that the 'inward' is a fact just as solid as the 'outward.'(a)

Some sources of error in sense-perception are given elsewhere under the head of Illusions and to these no reference will here be made; we rather wish to insist on the point that though each individual may be sure of his own sense-perceptions, he cannot, or should not, be equally sure that others necessarily perceive as he does. Yet the attitude of the ordinary man is to accept the statements of others as to their sense-perceptions only so far as what they say agrees with his own experience; it is a natural attitude, it is true, but we think it would be well to recollect the assumption on which it is founded and to be sometimes less sceptical as to the possibility of what others say they have experienced.

"I don't think," says the writer quoted above, "we can be sure that the sensible qualities we perceive are for everyone the same. We infer from the apparent identity of our structure that this is so; and our conclusion, though not proved, possesses high probability....what, however, we are convinced of, is briefly this, that we understand and, again, are ourselves understood....the fact is that, in the main, we behave as if our internal worlds were the same. But this fact means that, for each one, the inner systems coincide....what is the amount of variety then which such coinciding orders will admit? We must, I presume, answer that, for all we know, the details may be different but that the principles cannot vary. There seems to be a point beyond which, if laws and systems come to the same thing, they must be actually the same. And the higher we mount from facts of sense, and the wider our principles have become, the more nearly we have approached to this point of identity—.....It is, for example, more likely that we share our general morality with another man than that we both have the same tastes or odours in common."(b)

This is an instructive passage, though we doubt whether most readers would look for identity in our ideas rather than in our sensations; we shall, however, give reasons for believing that man-

---

(a) F. H. Bradley, *Appearance and Reality*, p. 189.

(b) *Ibid.* pp. 344-5.

kind are less alike than is usually supposed, both in their powers of sensation and ideation.

It has been ascertained by experiments that different races vary much in respect of such powers. The Uralis and Sholagas of Madras, the Murray Islanders of the Torres Straits, the Todas of Madras and the modern Egyptians are much more insensitive to blue, and to a less extent to green, than the English. This is thought by Mr. C. S. Myers to be due to some special cause, perhaps to pigmentation of the sensory epithelium. It is noticeable that among the Burmese blue or green-coloured clothes are rarely worn. In hearing, the sensitivity to difference of pitch is distinctly less among the adults of primitive communities than among those of civilised communities. In touch, primitive peoples are much more sensitive. The Papuan Murray Islanders were able to distinguish a two point from a one point touch, when the compass points were separated by a distance of about a third of what is necessary in the case of University men. Boys at the elementary school were more sensitive to the test than those at the preparatory school of the same age. The Todas of Madras, who are more cultured than the Papuans, fall between the latter and the English. Similarly the capacity to discriminate between lifted weights is greater among more primitive than among civilised people.(a)

5. But it is not only among persons of separate races that differences are to be found. When speaking of memory, we attempted to bring home to the reader the extent to which individual recollections of the same occurrence may vary, by describing the results of certain psychological experiments. In the case of observation the same course seems even more desirable, as it is generally assumed that we all perceive our surroundings uniformly. The results of some further experiments, which we shall now give, seem to indicate clearly that we do not all perceive the same thing, and that what we perceive does not have the same meaning to all of us in our immediate absorption of the surrounding world.

---

(a) C. S. Myers: An Introduction to Experimental Psychology, pp. 30—41, and 98—102.

Prof. Munsterberg tested the sense-perceptions of one hundred students with respect to estimation of number, time, sound, size, colour, and also as to the identification of objects. Some experiments were with and some without the influence of suggestion, and they were selected so as to exclude, as far as possible, the opportunity of error occurring by mistake of memory.

They were shown a large sheet of white cardboard on which fifty little black squares were pasted in irregular order for five seconds, and were asked how many black spots were on the sheet. The answers varied between twenty-five and two hundred. The answer, over one hundred, was more frequent than that of below fifty. Only three felt unable to give a definite reply. A cardboard with only twenty such spots was next shown. The replies then ran up to seventy and down to ten. The professor remarks that he had highly trained, careful observers for the experiments, whose attention was concentrated on the material and who had full time for quiet scrutiny: yet in both cases some believed that they saw seven or eight times more points than some others saw. He suggests that if two witnesses had varied in this way in court the judge would almost certainly have not believed in the sincerity of one or the other.

They were next asked to give the number of seconds which passed between two loud clicks separated at first by ten seconds and afterwards by three seconds. In the first case the answers varied between half a second and sixty seconds, a large number judging forty-five seconds to be the right time. In the second case, the answers varied between half a second and fifteen seconds. The variations are remarkable considering that the students knew beforehand that they were to estimate the time interval: they would doubtless have been greater, if they had received no such warning, yet it is in the latter circumstance that witnesses usually have to depose as to a time interval.

Again, as to the estimation of rapidity, a subject of much interest in cases relating to the speed of motor cars. A large clock was shown with a white dial over which one black pointer moved one round in five seconds. The end of the black pointer, which had the form of an arrow, moved over the edge of the dial



with the velocity of ten centimeters in one second; *i.e.*, in one second the arrow moved through a space of about a finger's length. The clock was made to go for a minute and the observers were asked to watch the rapidity of the arrow and describe either in figures or by comparison with moving objects, the speed with which the arrow moved along. The answers included: man walking slowly; accommodation train; bicycle rider; funeral in a street; trotting dog; faster than trot of man; electric car; express train; gold fish in water; fastest automobile speed; very slowly like a snail; lively spider, etc. Yet the experiment excluded every possible mistake of memory and suggestive influence. Those who judged in figures showed no less variation: one revolution in two seconds; one in forty-five seconds; three inches a second; twelve feet a second; thirty seconds to the hundred yards; seven miles an hour; fifteen miles an hour; forty miles an hour, etc. In reality the arrow moved in an hour about a third of a mile: not a few, therefore, multiplied the speed by more than one hundred.

The class was next asked to describe a sound and say from what source it came. The sound was the tone of a large tuning-fork struck out of sight. Only two out of one hundred recognized it as a tuning-fork tone. Others took it for a bell, organ pipe, muffled gong, brazen-instrument, horn, 'cello string, violin, etc. Or they compared it with different noises, as the growl of a lion, steam whistle, fog-horn, fly-wheel, human song, etc. The descriptions of it were:—soft, mellow, humming, deep, dull, solemn, resonant, penetrating, full, rumbling, clear, low: but then again, rough, sharp, whistling etc. Here also everyone knew beforehand that he was to observe the tone. Some sheets of white cardboard were shown containing a variety of dark and light ink spots fantastically arranged. Each card was shown for two seconds, and it was suggested that these rough ink drawings represented something in the outer world. Immediately after seeing it the students were to write down what the drawing represented. Some said they were merely blots of ink, but in the larger number the suggestion was effective, and a definite object was recognised. One picture was described as: Soldiers in a valley; grapes; a

palace ; a river bank ; landscape ; foliage ; rabbit ; town with towers ; rising storm ; shore of lake ; flag ; china plate ; trees with stone wall ; clouds ; elephant ; map, etc. There were hardly any repetitions except "landscape." To test comparison of size, the students were asked to compare the apparent size of the full moon with some object held at arm's length : that is to say, to describe an object just large enough, when seen at arm's length, to cover the whole full moon. The answers included : quarter of a dollar ; large dinner plate ; my watch ; six inches in diameter ; silver dollar ; hundred times as large as my watch ; man's head ; fifty-cent. piece ; nine inches in diameter ; carriage wheel ; orange ; ten feet ; two inches ; one-cent. piece ; a pea ; palm of the hand ; three feet in diameter, etc. The man who was right was the one who compared it to a pea.

*Colour.*—Some pairs of coloured paper squares were shown, and the men were asked which of the two appeared to them the darker. First a red and a blue ; then a blue and a green ; and finally a blue and a grey. The grey was objectively far lighter than the dark blue, and should have appeared so to anyone with an unbiassed mind. Yet about one-fifth of the men wrote that the grey was darker. The professor explains that this must have been due to suggestion, the mere idea of greyness giving to these suggestible minds the belief that the colourless grey must be darker than any colour. They judged not from the optical impression but entirely from their conception of grey as darkness.

In the next experiment the Professor stood on the platform behind a low desk and told the men to watch and describe everything he was going to do from one given signal to another. As soon as the signal was given, he lifted with his right hand a little revolving wheel with a colour-disk and made it run and change its colour, and all the time turned his eyes eagerly towards it. While this was going on, he took with his left hand first a pencil from his vest pocket and wrote something at the desk ; next he took his watch out and laid it on the table ; then he took a cigarette-box from his pocket, opened it, took a cigarette out, closed it with a loud click and returned it to his pocket. Eighteen of the hundred did not notice anything at all that he did with his

left hand. Fourteen of these eighteen were the same who in the preceding experiment judged light grey to be darker than dark blue. The fact that the professor himself seemed to give all his attention to the colour wheel had evidently inhibited in them the impressions of the other side.

The power of suggestion was again illustrated in another experiment. The Professor showed printed words with an instantaneous illumination, and found that, whenever he spoke a sentence beforehand he was able to influence the seeing of the word. Thus the printed word was "courage;" he said something about university life and the subject read "college." The word was "Philistines;" he said something about Colonial policy, and "Philippines" was read, and so on.

Thus it is never a question of pure sense-perception. Association, judgments, suggestions, penetrate into all our observations. There are, however, certain facts relating to sense-perception which psychology can teach the judge and jurymen of which Prof. Munsterberg gives a few examples. A witness says that he saw in late twilight a woman in a red gown or a blue gown: do they know that such a faint light would still allow the blue colour sensation to come in, while the red colour sensation would have disappeared? Some directions of sound are mixed up by us all, and some are discriminated. We know whether we heard on a country road a cry from the right or from the left, but we may be quite unable to say whether we heard it from in front or from behind. A man stabbed with a pointed dagger may have felt it like a dull blow. The same substance may taste quite differently on different parts of the tongue, which may be important in poison cases. Parties to a civil suit may quarrel as to the size, length and form of a field as it appeared to them, and this may be because the same distance appears differently under different conditions. A witness who sees through a key-hole makes erroneous judgments as to the size of objects and their place: or one who felt some smooth, cold metal may be sure that he had felt something wet.(a)

---

(a) H. Munsterberg: *Psychology and Crime*, pp. 15—35.



We may add to such sources of error those resulting from mistakes in recollection, of which similar examples were given in the preceding chapter. The question that we then wish to ask is not whether the lawyers make allowance for such discrepancies in evidence, but, whether they make anything like sufficient allowance? From the types of cross-examination which we have seen and the arguments in appeal cases that we have heard, we are convinced that the advocates have an altogether exaggerated idea of the importance of contradictions and discrepancies and omissions of observation in the testimony of witnesses. Unfortunately many judges display equal perversity. What is called an analysis of evidence seems with them often to take the shape of setting out a number of discrepancies in the depositions on less important and prominent matters than those concerning which the reports of these American students varied so much. Nor when the commentators offer advice on this subject do they appear to grasp the fact that persons can observe the same facts differently. The allowances which they would make are justified on entirely different grounds. Thus Mr. Mayne refers to the inveterate habit of native witnesses of always answering with the greatest minuteness to details which they never observed, or would certainly have forgotten, in order to show the accuracy of their memory or to strengthen the belief that they are talking of things which they really saw. They are wrongly disbelieved because they embellish their facts with a fringe of fiction, whereas "a European witness who did the same would probably be absolutely unworthy of credit. It is an equally common mistake to attribute weight to discrepancies in testimony. They generally amount to little more than this, that witnesses who agree in what they really saw, vary in what it occurs to them to invent under the pressure of cross-examination." (a) Much of this doubtless is true, but there is no trace here of any realisation of the truth that people honestly observe differently: it is all based on the old assumption that every one must observe alike, and discrepancies must be due either to forgetfulness or some motive which is strictly speaking dishonest, though sometimes it may be venial. It seems not unlikely that if this is

---

(a) J. D. Mayne: *The Criminal Law of India*, pp. 559-560.

all the allowance that can be made, many of the disinterested American students of the professor's experiments would be held by Mr. Mayne to be "absolutely unworthy of credit" on account of dishonest inventions.

6. In order to show that some individuals possess powers beyond the average, the examples cited must necessarily be of an abnormal kind, or at least of a kind which are at present considered abnormal, and it is, therefore, submitted that to discard these from consideration as exceptional instances, would be merely to admit that our contention is established but to refuse to face the consequences. The consequences, as we hold, are simply the conclusion that under similar circumstances it is probable that any man might exhibit the same powers, and, stated more broadly, that as our knowledge is at present insufficient to lay down under what conditions such powers can be exerted, it is unsafe to reject as incredible reported cases of the exercise of such powers.

“In somnambulism (the meaning of which is explained in the remarks on Hypnotism) the senses are not merely awake but quickened to an extraordinary degree. Subjects feel the cold produced by breathing from the mouth at a distance of several yards. . . . The activity of the sense of sight is sometimes so great that the range of sight may be doubled, as well as the sharpness of vision. The sense of smell may be developed so that the subject is able to discover by its aid the fragments of a visiting card which had been given him to smell before it was torn up (Tagnet). The hearing is so acute that a conversation carried on in the floor below may be overheard (Azam).”(a) Surely this shows that we actually possess greater powers than we usually display, and when persons are reported to have displayed them on any occasion we should at once enquire as to the condition of the subject at the time, whether he was undergoing great excitement, etc.

Again as to memory the same writers say that its power is exaggerated under somnambulism and depressed on a return to the normal state, and we are completely ignorant of the cause of

---

(a) Animal Magnetism, Binet & Féré, pp. 134-5.

such variation ;(a) but for more concerning this we must refer the reader to our remarks elsewhere on exceptional memory in certain pathological states.

As to touch, it is said " the hyperæsthesia of the sense of touch enables the subject to recognize the contact of one operator in a thousand ; he may even recognize it through his clothes." (b) Prof. James has also quoted a number of instances of hyperæsthesia of the senses (c) in one of which a person was able to pick out a blank card from a pack of similar ones merely by its weight, in another a man was actually able to read the image of a page of a book reflected on the operator's cornea and to discriminate with the naked eye details in a microscopic preparation. Such powers explain the so-called 'Magnetic rapport' with the operator when the patient's senses are acutely sharpened for all the operator's movements. " I must repeat, however," says Prof. James, " that we are here on the verge of possibly unknown forces and modes of communication. Hypnotization at a distance, with no grounds for expectation on the subject's part that it was to be tried, seems pretty well established in certain very rare cases. See in general for information on these matters, the Proceedings of the Soc. for Psych. Research, *passim*."

And lest the reader should think that such examples are confined to cases of hypnotism we would here allude also to instances in which persons just prior to death have displayed extraordinary powers of vision and hearing, being aware of the approach of a friend some time before he would ordinarily be within either hearing or seeing distance, and sometimes appearing to see through walls and opaque surfaces. It is the great service of the late Mr. F. W. H. Myers and the Psychical Research Society that they have accumulated and investigated so many cases of this description that the unprejudiced reader can no longer refuse to admit their occurrence, whatever their explanation may be.

Lastly, reference must be made to unusual powers which blind people sometimes appear to possess. Professor Metchnikoff

---

(a) Animal Magnetism, Binet & Féré. p. 142.

(b) *Ibid.*, p. 151.

(c) James, *op. cit.*, Vol. II, pp. 609-611. See also his Essay on Psychical Research in the Will to Believe and other Essays, pp. 299 *et seq.*



speaks of a special kind of sensibility of the blind called the 'sense of obstacles' which enables them to avoid obstacles and recognise at a distance objects round about them. He quotes Dr. Jeval (*Entre aveugles*, Paris 1903), that some blind people can quote the ground floor windows of a house when passing, distinguish houses from shops and count the number of doors and windows. He considers that the existence of this sense of obstacles rests upon so many facts that it is indubitable. Dr. Zell thinks all people have it but it is not noticed usually. Metchnikoff refers it to the action of the tympanic membrane and the auditory apparatus.(a) Mr. W. H. Levy stated that he seemed to perceive objects through the skin of his face and to have the impressions immediately transmitted to the brain. None of the five senses had anything to do with this power and he regarded it as an unrecognized sense which he called 'facial perception.' By it he could distinguish shops from private houses, point out doors and windows whether they were shut or open, estimate the height of a fence and discover irregularities in height, and projections and indentations in walls.(b) Helen Keller who lost her sight and hearing in early infancy can recognize persons by the mere contact of their hands.(c) And as regards ideas an instance showing the different powers of individuals will be drawn from general ideas. It was long disputed as to how these were formed and what was the character of the generic image employed, but it now seems clear that different individuals employ different images, and they could not for a long time conceive it possible that anyone could employ in thought any other kind of image than those they themselves used. The truth was discovered here mainly by examination of unusual and exaggerated instances. "The study of a large number of normal and morbid cases," says Ribot, "has led to the knowledge of several types: motor, auditory, and visual according to the group of images predominating in each individual, not to mention the ordinary or indifferent type. The person who thinks his words by articulating them without hearing them (Stricker) and the person

---

(a) E. Metchnikoff, *Prolongation of Life*, pp. 259-60.

(b) See the Extracts from his work 'Blindness and the Blind' quoted by James, *op. cit.*, Vol. II, pp. 204-205.

(c) Stout, *Groundwork of Psychology*, pp. 58-59.

who thinks his words by hearing them without articulation (V. Egger); the person who thinks his words by seeing them written, without either hearing or articulating them, all these represent irreducible types. This precludes all discussions, each person is right in so far as he himself, and people like him are concerned; but he will be wrong if he generalizes without restriction.”(a)

There further appear to be means of communicating ideas which as yet are not understood. Mr. McDougall considers that the evidence for Telepathy, by which is meant the communication of mind with mind by means other than the recognized channels of sense, is of such a nature as to compel the assent of any competent person who studies it impartially.(b) He does not accept in explanation the hypothesis of “brain waves” transmitted through the ether. Speaking of M. Richet’s Essay on Mental Suggestion, Binet says: “His researches tend to the conclusion, which the author regards as probable, that thought is transmitted from one brain to another without the intervention of signs appreciable to our senses,”(c) a subject which has been investigated by the Psychological Research Society under the title of Thought Transference.

Finally we must briefly allude to the phenomenon known as double consciousness; experiments concerning it seem to prove that when a sensation is given, if its intensity is diminished it is no longer perceived by the principal consciousness, but may be discovered in a secondary consciousness, which can perceive or experience sensations below the intensity required for the ordinary consciousness. Hence in hysterical persons there seems reason to believe that sometimes they may actually experience by their second consciousness or sub-consciousness what others cannot.(d)

The fact that some writers, *e.g.*, Prof. Munsterberg,(e) deny the existence of sub-consciousness and say that facts referred to it either do not belong to the mind at all but are simply processes in the physical organism or are facts which go on in the conscious

---

(a) Ribot on Attention, p. 54, note.

(b) W. McDougall, Body and Mind, p. 349.

(c) Binet, Double Consciousness, p. 6.

(d) Binet, Double Consciousness, p. 65 and *passim*.

(e) H. Munsterberg, Psychotherapy, p. 133.



mind, but which are abnormally connected, does not affect the result for our purpose. The fact remains that there are cases in which the person when in one state of consciousness is entirely ignorant of what has happened to him when in another state of consciousness and can give no account of his own behaviour while in the previous state. Allied to such cases are those of actual sub-consciousness in which bodily processes are unconsciously effected. Examples of these quoted by Mr. McDougall are automatic speech and hand-writing and actions done on post-hypnotic suggestion.(a)

7. It is not proposed to offer conjectural explanations of the above facts, but to accept their existence and to state the conclusion which the author would draw from them.

Conclusions to be drawn from these cases.

It is said by Best, referring to the observer's powers of perception and observation "and here it is important to ascertain whether he is a discreet, sober-minded person, or is imaginative and imbued with a love of the marvellous, and also whether he lies under any bias likely to distort his judgment."(b) The caution no doubt is needed, but we must at the same time observe that there is too great a tendency to set down as 'imaginative and imbued with a love of the marvellous' anyone who professes to have seen or heard anything unusual, and to discredit him merely on such a ground. We do not doubt that the criticism that will be passed on some, at all events, of the instances we have cited is that they are examples of powers said to have been displayed by people in pathological and unduly excited states and are therefore not to be trusted. But it is not against these cases that they are of this description, for it would appear that it is especially when persons are in such states that they display these powers, and if therefore such states are a condition of their display it is equivalent to begging the question to discredit them on that very ground.

We think that it has been sufficiently shown that under certain circumstances unusual powers of sensation are displayed, and that we have no grounds for limiting the possibility of their display to those particular circumstances: when therefore it is asserted

---

(a) W. McDougall, *Body and Mind*, p. 374.

(b) Best on Evidence, § 22.



on oath by an apparently respectable witness that he saw or heard or otherwise experienced something involving a display of power of the sense concerned beyond what the Magistrate believes to be possible to himself or mankind in general, his statement should not be forthwith discredited as impossible. "When a supposed fact," says Best, "is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible." (a) But the laws of nature are not fixed and immutable and such an assumption is absurd. "Whatever the *forces* of nature may be," says Dr. Ward, "the *laws* of nature are not facts, as the constant confusion of the two conceptions might lead us to suppose. Every such law was at its inception merely a hypothesis awaiting verification." (b) They are simply what our knowledge makes them, and vary with it, and what may have formerly appeared to us physically impossible is no longer so, we submit, in the light of our present information concerning the senses and their powers. To fail to maintain an open mind on such a matter and to give to a statement of the kind we have described a careful consideration may easily result in a wrong decision on the evidence, the usual termination of wholesale scepticism. (c)

8. It is said : "a person may always testify to his own mental and physical condition, his testimony being based not on inference but consciousness, but it is not so with respect to the mental condition of others." (d) 'Consciousness' however is too wide a term as it stands for the whole mental state for the time being, which may well include inference : as opposed to inference, intuitive knowledge or perception is doubtless intended, and, as it is of the individual's own mental condition, introspection may be the word appropriately employed.

---

(a) Best on Evidence, § 24.

(b) J. Ward, Naturalism and Agnosticism, Vol. II, pp. 219-220.

(c) On the attitude of the average man towards unusual psychical phenomena, see note at the end of this Chapter.

(d) Ameer Ali and Woodroffe's Indian Evidence Act, p. 400.

Now it is only the Psychologist who is truly aware of the difficulties of introspection : the plain man has usually little doubt that he can describe his feelings correctly and the law really permits his description of them because it shares this belief, though writers on evidence may seek to account for it by distinctions between inference and consciousness. It is proposed therefore to explain what the difficulties are in order that it may be realized to what extent a witness is likely to err when he tries to depict his mental condition.

**Sources of error in  
introspection.**

“ When the Psychologist,” says Ribot, “ attempts by internal observation to catch himself, as he calls it, he attempts an impossibility. At the instant he sets about this task, either he will adhere to the present, which will hardly advance him ; or extending his reflection over the past, he will affirm himself to be the same as he was one year or ten years ago.....By inward observation he can only apprehend passing phenomena.....In fine to reflect upon the ego is to assume an artificial attitude which changes the nature of the ego ; it is to substitute an abstract representation for a reality. The true ego is that which feels, thinks, acts without exposing itself to its own view ; for by nature and by definition it is a subject ; and to become an object it must undergo a reduction, a kind of adaptation to the optics of the mind which transform and mutilate it.”(a) Somewhat similarly Mr. Bradley says, “ we may confuse the feeling which we study with the feeling which we are. Attempting so far as we can to make an object of some (past) psychological whole, we may unawares seek there, every feature which we now are and feel, and we may attribute our ill-success to the positive obstinacy of the resisting object.....to observe a feeling is to some extent always to alter it ; ” and again there is the difficulty of description. “ Feeling cannot be described for it cannot, without transformation, be translated into thought,” though you may find reality in feeling you do not get it in description of feeling ; “ we find this exemplified most easily in an ordinary emotional whole.....if made an object, it, as such, disappears. The emotion we attend to is, taken strictly, never

---

(a) Ribot, *Diseases of the Personality*, pp. 38, 85.



precisely the same thing as the emotion which we feel. For it not only, to some extent, has been transformed by internal distraction, but it has also now itself become a factor in a new-felt totality.”(a)

Prof. Sully terms an illusion of introspection an error involved in the apprehension of the contents of the mind at any moment, such as mistaking the quality or degree of a feeling or the structure of a complex mass of feeling, or confusing what is actually present to the mind with some inference based on this.(b) He explains that what we are accustomed to call a purely presentative cognition, is really partly representative and there is no such thing as pure feeling; the recognition of internal feelings implies the presence of the appropriate or corresponding class-representation, and if a wrong representation gets substituted for the right one, the feeling is wrongly classified. As external sensations come in groups and our consciousness is made up of a mass of feelings and active impulses which combine in an inextricable way, and as further mental states are not abiding and steady but unstable, fleeting, and changeable, analysis is difficult.(c)

Again, there is the sub-conscious region, for conscious personality does not include all that takes place in the nervous centre, but is only an abstract or synopsis of it;(d) here the feelings, if feelings they may be called, are shadowy, but influence the total state though we do not perceive it, and in rare cases we have two states of consciousness not known to each other, co-existing in the mind of the patient, two rational faculties mutually ignorant; such splitting up of the mind into separate consciousness is probably only possible where there is abnormal weakness; but, Prof. James, after reviewing the evidence, says, “they prove one thing conclusively, namely, that we must never take a person’s testimony, however sincere, that he has felt nothing, as proof positive that no feeling has been there. It may have been there as part of the consciousness of a ‘secondary personage’ of whose experience the primary one whom we are consulting can naturally

---

(a) Bradley, *Appearance and Reality*, pp. 232, 521.

(b) Sully, *Illusions*, p. 192.

(c) *Ibid.*, p. 193.

(d) Ribot, *op. cit.*, p. 150.



give no account.”(a) Another cause of error is the change of our moods ; the law of relativity causes us to regard certain states as indifferent when we glance back at them in moments of strong excitement, for ‘ we can recall images and situations from the past but only most imperfectly the moods which animated us.’(b)

Considerable power of abstract attention is in the first instance required to recognize an internal state, and if it is a passion, this state is not favourable for observation ; and, apart from the other sources of error mentioned above, there is further the fallibility of memory. Nor is the mere certainty of the witness a guarantee that can always be trusted because, as Prof. Sully says, “ transitory feelings which cannot at the moment be seized by an act of attention are pretty certain to disappear at once, leaving not even a temporary trace in consciousness.”(c) Hence we easily deceive ourselves. For example, a motive may enter into our action which is so entangled with other feelings as to escape our notice, and “ if a man is asked whether a rapid action was a voluntary one, he may in retrospect easily imagine that it was not so, when as a matter of fact the action was preceded by a momentary volition. When a person exclaims ‘ I did a thing inadvertently or mechanically ’ it often means that he did not note the motive underlying the action.”(d)

Finally, present feeling or thought can be confounded with some inference based on it, and in the case of present emotional states the present is liable to be confused with the past : concerning inference more will be said later.

The chief causes of these illusions of consciousness are then the confusion of distinct elements, including wrong suggestion, due to the intricacies of the phenomena, a powerful disposition to read something into the phenomena, and the mixing up the facts of present consciousness with inferences from them.

(a) Binet, *Double Consciousness*, p. 43 ; James, *op. cit.*, Vol. I, p. 209.

(b) Höffding, *Outlines of Psychology*, pp. 241, 287.

(c) Sully, *op. cit.*, p. 199.

(d) *Ibid.*, p. 204.

9. It must not be supposed, however, that we wish to deny any validity to introspection. Here, if any where, we have immediate knowledge, and it is this which gives us the feeling of certainty which is sometimes apt to mislead us ; it is rather as a protest against excessive reliance on such evidence that we have thought it right to enumerate the sources of error connected with it. Prof. Sully concludes that the illusions in introspection “ do not affect the value of the method more than the risk of sense-illusion can be said materially to affect the value of external observation ; ” (a) the errors are more limited than those of sense-perception and the feeling of certainty the same as that which the mind has of its own sensations from without. Further, the contrast between the inner and outer experience is much less than it seems, and when we compare our individual feelings through language, we find our inner experience is in all its larger features a common experience. Similarly Prof. Titchener says that there is no difference in principle between inspection and introspection. (b)

But, if this is so, why should this sharp distinction be drawn between a man's testimony as to his own mental condition and his testimony as to the mental condition of others ? We are told that it is because the one kind is based on consciousness and the other on inference, and we have seen what consciousness means : it remains now to examine what this ‘ inference ’ really is.

Prof. Sully calls it ‘ Insight ’ and describes it as the ‘ intuitive ’ process by which we apprehend the feelings and thoughts of other minds through the external signs of movements, vocal sounds, etc., which make up expression and language. (c)

It is often, but not always, a process of inference involving a conscious reference to our own similar experiences ; for the infant mind seems to have a certain degree of instinctive or inherited capacity to make out the looks and tones of others. As life progresses, however, much of this interpretation comes to

(a) Sully, *op. cit.*, pp. 208—211.

(b) Titchener, *Psychology of Feeling and Attention*, pp. 174—80.

(c) Sully, *op. cit.*, p. 217.

be automatic or unconscious, and the reading of others' feelings approximates in character to an act of perception. He therefore defines intuitive insight as that instantaneous automatic or unconscious mode of interpreting another's feelings, which occurs whenever the feeling is fully expressed and when its signs are sufficiently familiar to us. It closely resembles sense-perception since it proceeds by the interpretation of a sense-perception by means of a representative image, it differs from it and is nearer introspection, because while in the former case the process of interpretation is a reconstruction of external experiences, in the latter it is of internal experiences.(a)

An illusion of insight is a quasi-intuition of another's feelings which does not answer to the internal reality as presentatively known to the subject himself, and may arise, as in the case of introspection, either by way of wrong suggestion or of warping pre-conception. Our insights are determined by previous experience, association and habit, and an illusion is thus a wrong interpretation of a new or exceptional case. We are liable to be misled by the conscious deception of others, and we may also too hastily project our own feelings and thoughts into other minds, risks to which we are not subject in introspection.

Now if we consider the nature of the process as explained above, it does not seem to be legitimately described as inference, unless by 'inference' is intended something different from what is ordinarily understood by that term. For there is a form of sensuous inference which is not the same as intellectual inference, and it is the latter process to which allusion is made when the distinction is talked of between 'matter of fact' and 'matter of opinion' (b): sensuous inference is involved in every act of perception, and is sometimes called unconscious inference. We shall attempt to make the distinction clear by a few quotations.

“ If,” says Prof. James, “ every time a present sign suggests an absent reality to our mind we make an inference, and if every

(a) Sully, *op. cit.*, pp. 217—220.

(b) Ameer Ali and Woodroffe, *op. cit.*, pp. 398—400.



time we make an inference we reason, then perception is indubitably reasoning. Only one sees no reason in it for any unconscious part. Both associates, the present sign and the contiguous things which it suggests, are aboveboard, and no intermediary ideas are required." If, however, what is meant is that perception is a *mediate* inference and that the middle term is unconscious, he denies this as follows:—"Since the brain-process of 'this,' the sign of *A*, has repeatedly been aroused in company with the process of the full object *A*, direct paths of irradiation from the one to the other must be already established, and although roundabout paths may also be possible, as from 'this' to 'those,' and then from 'those' to *A* (paths which would lead to practically the same conclusion as the straighter ones), yet there is no ground whatever for assuming them to be traversed now, especially since appearance points the other way." (a)

So Prof. Stout writes "If we define it (*i.e.* inference) as a mental construction issuing in a judgment or belief, then undoubtedly inference is involved in sense-perception. But it will be generally admitted that this definition is too wide. We may try to amend it by saying that inference is a mental construction which both has its points of departure in a judgment and issues in a judgment. On this view we should have to refuse the title to merely perceptual process, however constructive it may be. But this does not touch the essence of inference. This involves a clear distinction of reason and consequent, and the apprehension of their connection.....what ultimately compels the inference is the special nature of the whole which is presented as the result of the constructive process." (b)

Binet indeed holds that the mental process in perception is really the same as in reasoning, and if so, this would *ipso facto* do away with the distinction of inference and non-inference relied on in the passage quoted on Evidence. Thus he says "The mental process in the case of external perception belongs to the class of *unconscious* reasoning. But little importance need be attached to this characteristic; for there is really one method of reasoning,

---

(a) James, *op. cit.*, Vol. II, pp. 111-112.

(b) Stout, *Analytical Psychology*, Vol. II, p. 71.

and the study of unconscious reasoning leads us to conclusions which are applicable to all kinds of ratiocination. These conclusions are : that the fundamental element of the mind is the image ; that reasoning is an organisation of images, determined by the properties of the images themselves, and that the images have merely to be brought together to become organised, and that reasoning follows with the inevitable necessity of a reflex.”(a)

We prefer, however, to keep the distinction between the two kinds of inference already referred to, the inference being in the one case implicit and in the other mediate or conscious, a distinction which has been well described by Prof. Sully : “ Our first judgments are intuitive, the element of inference being implicit only and not distinctly realised in thought. As intelligence develops and thought grows more explicit, the differentiation of intuitive and reasoned judgments becomes clearer.”(b) In implicit reasoning the mind passes from one or more old experiences some or all of which are distinctly recalled according to circumstances, to new ones, without seizing the general rule or principle involved in the procedure.(c)

Now that the writers on evidence do not by the term ‘ inference ’ intend to denote this implicit or unconscious reasoning is indicated, *e.g.*, by a passage like the following “ in all supposed statements of facts the witness really testifies to the opinion formed by the judgment upon the presentment of the senses,”(d) for such evidence is held to be admissible ; and again, “ the opinions of ordinary witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal, *e.g.*, questions relating to time, quantity, number, dimensions, height, speed, distance or the like.”(e) But they appear sometimes to confuse this species with mediate or conscious inference, and we think that this has been done in the passage we have been criticising. The real reason why

---

(a) Binet, *Psychology of Reasoning*, p. 3 ; *cf.* also pp. 80, *et seq.*

(b) Sully, *Outlines of Psychology*, p. 283.

(c) *Ibid.*, p. 286.

(d) Ameer Ali and Woodroffe, *op. cit.*, p. 398.

(e) Taylor on Evidence, § 1416.



the law permits a man to testify to his own mental condition but not to that of another man, if such be the fact, is, we imagine, because he is supposed to have intuitive or certain knowledge of his own mental state, but only to be able to observe the mental state of others with less certainty. So far as inference and consciousness are concerned there is no more objection to his deposing that he perceived another man to be angry than there is to his saying that he himself was in a state of anger.

10. It is probably merely owing to the capriciousness of legal decisions in the past that the writers on evidence have had to invent explanations of this kind to account for them, but it is unfortunate that through ignorance of Psychology they have provided reasons which will not bear examination. It is said for example that "statement of opinion is, therefore, necessarily involved in statement of fact" and that it is erroneously supposed to be an 'opinion' when, owing to the phenomena being too numerous or intangible to permit of correct or effective individual statement, witnesses are permitted to state simply the impression such phenomena produced in their minds. This apparently is simply another method of stating facts."

We do not see how an 'impression' of the sort mentioned in the quotation can be referred to as a fact as opposed to an inference of any kind: the real explanation of their admission in evidence seems to be given on the next page, *viz.*, that positive and direct evidence is unattainable here. Hence they are also described as 'opinions from necessity.' If the impression be regarded as one fact, a witness of course may speak directly to the existence of the impression, and this would involve no inference; but if the impression is taken to represent the result of many sensations, observations, &c., then it seems to us it must clearly be regarded as the conclusion drawn from a number of data, though we are willing to admit that the conclusion is not drawn in as fully conscious a manner as a regular inference with an explicit middle term.

The process has been described in the quotation from Professor James' work given elsewhere,<sup>(a)</sup> and it must be insisted

---

(a) See p. 318.



that the general impression or total effect is not the same thing as all the facts from which it is drawn shortly stated, which is what we understand the commentators to mean when they call it "simply another method of stating facts," and is further indicated by the next quotation :—"As all language embodies inference of some sort, it is not possible to wholly dissociate statement of opinion from statement of fact. The evidentiary test has been said to be, that if the fact stated *necessarily* involves the component facts, it will be admissible as amounting to a mere abbreviation: if it does not necessarily involve them, but may be supported upon several distinct phases of fact, the particulars only should be given and not the inference." (a)

It is not the language which necessitates the inference but the interpretation of the percepts, *i.e.*, the sensation and objects presented to our senses: language only embodies the results of the inferences already made. It seems to us therefore a confusion to say that we cannot dissociate opinion from fact because each has to be stated, and the method of statement involves inference in each case: because the method of statement is identical it does not therefore follow that what is stated is also identical, which appears to be the argument employed. It is further, we must repeat, impossible to arrive at any satisfactory result if sensuous and intellectual inference are confused, as they are when it is said or implied that, so far as inference is concerned, we do the same when we observe a fact and when we draw a conclusion.

"The evidentiary test, &c.,.....mere abbreviation." These words seem to mean that when a man states his own impression of a number of facts it is equivalent merely to an abbreviated statement of all those facts, a view, to which we have just objected above: you cannot get the impression or general idea of anything without leaving out a number of the particulars which go to make it up and joining together others in virtue of what they have in common. Further, we must again dispute the argument used here: it does not follow that because a fact (if the term can be used in this way as equivalent to a total) necessarily involves other

component facts, that therefore it is in its totality nothing more than those facts simply enumerated.

The same confusion may also be traced in the following passages:—

“Further in order to save time, a witness will be permitted to state the *result* of numerous or voluminous documents, subject to cross-examination as to particulars”(a) and again: “So a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts; and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner. But the word “result” must be construed strictly to mean the actual figures or facts arrived at.”(b)

Of course we are not contending that such evidence should be excluded; rather we object to the law of evidence for putting difficulties in the way of its admission. But it seems to us clear that the “result” as here used is an inference and it is useless to try and hide the fact that an inference is deliberately permitted.

It is also alleged that, as being a ‘matter of fact’ and not ‘of opinion,’ “a witness can testify as to whether a person appeared to be in good health’ or the reverse; or seemed ‘hostile’ or ‘friendly’; or appeared ‘intoxicated’; or looked ‘excited’; or ‘scared’; ‘old’ or ‘young’; or was of a particular age, ‘pleased’ or ‘agitated’; or that two persons seemed to be ‘attached’ to each other, &c.”(c)

One is tempted to ask whether, if these are ‘facts’ and not ‘opinions,’ there is any difference in the meaning of the two terms, or how the ‘impression’ produced on the mind by observed facts differs from one’s ‘opinion’ concerning the facts one observes? Is not one’s opinion always the impression made on one, *i.e.*, if we are to adhere to the ordinary signification of words?

---

(a) Ameer Ali and Woodroffe, p. 852.

(b) *Ibid.*, p. 493.

(c) *Ibid.*, p. 398.

Or, again, how can it be said that a witness may say that another looked 'excited' or 'intoxicated' because this is only 'another method of stating facts,' but he may not testify to the mental condition of others because such a statement would be based on an inference?(a) Surely the one statement is directly contradictory of the other, and the weakest of possible reasons is suggested for treating the two cases differently. If it is necessary to state the facts only which give rise to the conclusion that a man is insane, and you may not say simply that he seemed to you insane, on whatever grounds of evidence or common sense are you allowed to say that a man seems to you intoxicated or excited, without stating the facts which give rise to such a conclusion? To say that the one is an inference and the other is not but only 'another method of stating facts' appears to be nothing better than solemn trifling.

*NOTE on the attitude of some persons towards hyperæsthesia  
and any unusual psychical phenomenon.*

It is not improbable that some readers may regard it as extravagant or foolish even to take into consideration such matters as hyperæsthesia, hypnotism, thought-transference and the like in connection with legal evidence and the decisions of the law Courts. If so, we must protest against such an attitude. It has been the fashion to denounce Occultism, Spiritualism, Theosophy and similar studies as fanciful or even imposture, because of the *explanations* which they offer or pretend to give of the phenomena they investigate, and because their followers have sometimes descended to trickery in order to produce the appearance of such unusual events. But this excuse no longer exists when we have a body of facts sifted and investigated by a number of men whose integrity is above suspicion, and who have special qualifications for the task to which they have devoted themselves, as in the case of the Psychical Research Society and similar associations. Those who have read the evidence and are competent to judge have, we may say, unanimously admitted that instances have been established by these enquiries of the occurrence of manifestations of

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 400, with which compare p. 398.



unusual powers, such as are referred to in the text, whatever the true explanation of them may be.

To class the results of these labours with the achievements of the Spiritualists and Theosophists and reject them forthwith without any examination, is to our mind equivalent to exhibiting a complete lack of discrimination. It is no sound argument to say that in such matters the general opinion of the day should be accepted without challenge and that this opinion is against the existence of such phenomena. For the popular opinion is in this case that of the non-expert portion of the community on matters that require expert knowledge, and if you are incompetent to form an opinion yourself on any matter, it is absurd to adopt the less rather than the more learned opinion on the subject. Sir James Stephen no doubt has advocated the method of deciding truth and falsehood according to the views held by the bulk of the community, and has on this ground justified convictions for witchcraft by juries in the past,<sup>(a)</sup> and this is a very parallel instance. He argues that it was the duty of a jury to refuse to consider what were then the merely fanciful speculations which denied the existence of witchcraft, and in consequence of this many innocent persons were convicted apparently rightly in his opinion. In just the same way now, by a refusal to examine into the question of the existence of the unusual phenomena to which we have drawn attention, because the bulk of the community after no serious enquiry decline to believe in them, true statements may be, and doubtless sometimes are, disbelieved and injustice is done. We are now at the stage in which those who assert the existence of such phenomena are held by the bulk of the community to indulge in fanciful speculations, but before we determine to adopt this view we may remember that in the case of witchcraft such persons proved to be right; and may therefore pause to consider whether it will not be wiser to study first what the experts have said on the subject.

---

(a) See Chap. IX, para. 12 of this book.

## CHAPTER VII.

### THE NORMAL MAN.

The doctrine of the normal man as described in cases of negligence—Reason of the adoption of the doctrine—Claim of the doctrine to provide a general or universal rule—The theory stated to be a general idea—The nature of general ideas considered—How the theory is sought to be applied—Denial that the general rule is ever in fact applied—What is applied in its stead—Denial of any kind of existence to the normal man—Admissions of legal writers inconsistent with their theory—The normal man must vary according to circumstances—Admissions of legal writers which bear out the contentions of the text—Attempts to apply an impossible test cause injustice—Dissatisfaction of some legal writers with the way in which the law treats cases of negligence—Errors of the framers of the doctrine.

We shall next discuss a principle of some importance in law which will be referred to in these pages as the doctrine of the 'normal man.' In one shape or other it occurs in many connections, as will become apparent in the course of the discussion, but, as it is perhaps most prominent in the law relating to cases of negligence, we shall look first for a description of it there. It will be found to be frequently linked with another doctrine, *viz.*, that of 'natural and probable consequence,' to which we shall often have occasion to refer, and the normal man will be found to bear more than one title.

He is sometimes known as 'the reasonable man' or 'a reasonable man,' sometimes as 'the man of ordinary prudence,' or again he will appear as 'the man who displays common care and caution' or as 'the man of ordinary sense.' But under these various aliases there is a common feature, namely, that he does not correspond to anybody in particular in everyday life, but is rather a type with whom everybody may be compared, and it is for this reason that we have described him as the 'normal man.'

2. If the reader will refer to Sir F. Pollock's treatise on the Law of Torts, he will find a kind of description of him given here

and there piecemeal, and for want of a more explicit definition, we shall reproduce below some passages from that work.

“The doctrine of ‘natural and probable consequence,’” writes Sir F. Pollock,<sup>(a)</sup> “is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight: it has been defined as ‘the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.’ Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant’s place should have foreseen as likely to happen, there is no wrong and no liability, and the statement proposed, though not positively laid down, in *Greenland v. Chaplin*, namely, ‘that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur,’ appears to contain the only rule tenable on principle where the liability is founded solely on negligence.” And again when defining negligence,<sup>(b)</sup> ‘the general rule was thus stated by Baron Alderson: ‘Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do’ . . . . This, it

(a) Pollock on Torts, 6th Edition, pp. 39, 40.

(b) *Ibid.*, pp. 420-1.



will be observed, says nothing of the party's state of mind, and rightly. . . . . The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances. Facts which were known to him or by the use of appropriate diligence would have been known to a prudent man in his place, come into account as part of the circumstances. *Even as to these the point for actual knowledge is a subordinate one as regards the theoretical foundation of liability. (The question is not so much what a man of whom diligence was required actually thought of or perceived, as what would have been perceived by a man of ordinary senses who did think.)*"

The italics at the conclusion of this passage are ours, as it is desired to draw special attention to the words: they are a prominent part of the doctrine, for it is only as a matter of evidence and practice that proof of actual knowledge is considered to have importance. Thus the same writer continues "as matter of evidence and practice, proof of actual knowledge may be of great importance. If danger of a well-understood kind has in fact been expressly brought to the defendant's notice as the result of his conduct, and the express warning has been disregarded or rejected, it is both easier and more convincing to prove this than to show in a general way what a prudent man in the defendant's place ought to have known." (a) The admission as to the more convincing character of the proof of actual knowledge may however be noted in passing.

We will cite one more passage as it appears to give the reason for the adoption of the doctrine in question. Reason of the adoption of the doctrine. "We have assumed that the standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man—the average prudent man, or, as our books rather affect to say, a reasonable man—standing in this or that man's shoes." (b) The author then refers to the case of *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468; 43 R. R., 711, in which a

---

(a) Pollock on Torts, pp. 421-2.

(b) *Ibid.*, pp. 422-4.

hayrick had caught fire, and the jury had been directed "that the question for them to consider was whether the fire had been occasioned by gross negligence on the part of the defendant," and "that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." A rule for a new trial was obtained on the ground "that the jury should have been directed to consider, not whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence." The Court unanimously declined to accede to this view. They declared that the care of a prudent man was the accustomed and proper measure of duty. It had always been so laid down, and the alleged uncertainty of the rule had been found no obstacle to its application by juries. It is not for the Court to define a prudent man, but for the jury to say whether the defendant behaved like one. "Instead of saying that the liability for negligence would be co-extensive with the judgment of each individual which would be as variable as the length of the foot of each individual—he ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Sir F. Pollock then cites, apparently with approval, an American decision, *Commonwealth v. Pierce* (1884), 138 Mass. 165; 52 Am. Rep. 264, in which it is said "If a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his personal equation or idiosyncracies out of account, and peremptorily assumes that he has as much capacity to judge, and to foresee consequences as a man of ordinary prudence would have in the same situation."

It thus appears that it is claimed for the doctrine that it can be generally or universally applied, whereas

What the doctrine claims to do.      the test of the man's actual knowledge or capacity displayed in each case must continually vary, that it is sufficiently well understood that a court need not define it, but juries can apply it without any instructions and in

fact have always done so, and that the court may assume that every man has a capacity to judge events equal to that of the man of ordinary prudence.

3. As stated in the text-book the doctrine appears plausible at all events in some respects : it has an appearance of reducing to

**Objections to the doctrine. Analysis of the idea contained in the normal man.**

simplicity and providing a general rule or standard. But doubt arises when we attempt to see how it is actually applied, and the first question that one is disposed to ask, is whether as a matter of fact it is ever put into actual application. To determine this we must first consider the nature of this standard. The 'normal man' regarded as an idea can hardly be that of a concrete individual, for, if it were so, it could not boast of general applicability, and further, we are expressly told that the law deliberately leaves the personal equation or idiosyncracies of the individual out of account. It must therefore be taken to be a general or universal or abstract idea, for if, with Mr. Hobhouse(a) we admit an indeterminate idea, such an idea is, in his words, '*de facto* general, if it is on various occasions applied to distinct individual cases.' It thus seems necessary to have a clear conception of what a general idea is, in order to consider subsequently the manner of its application to individual instances.

Most Psychological writers have a theory of general and universal ideas, and they do not all agree as to what they are or how they are formed : there is not however any real dispute as to the fact that they arise through a comparison of individual instances, by which the common or like characteristics are retained, and the unlike ones either merely disregarded, as Bain said (b), or definitely recognised as irrelevant as Prof. Stout insists.(c) It is owing to this dropping of the particular details that the charge of vagueness has been brought against generic images by the late Prof. Huxley who compares them to what one sees in dreams or in the twilight(d) and, if they are really of this vague character, it would not be surprising that the 'normal

**General ideas.**

(a) L. T. Hobhouse, Theory of Knowledge, pp. 97, 98.

(b) Bain, Mental & Moral Science, p. 177.

(c) Stout, Analytical Psychology, Vol. II, p. 176.

(d) Huxley's Hume, pp. 92—94.



man' was described in the case quoted above as a 'standard too uncertain to afford any criterion.' This however appears to be a misapprehension: the indefinite feature about general ideas may be said to consist in a kind of back-ground termed by Prof. James the 'psychic fringe' (a) and by Prof. Stout 'the apperceptive system,' but it is not to this that the attention is directed. It is rather because they are not attended to that these elements appear vague. "General and typical ideas exist therefore in the sense that we are able to concentrate the attention on certain elements of the individual idea, so that a weaker light falls on other elements." (b) To illustrate however the importance of the back-ground we may quote Prof. Stout "the universal element in intuitive thinking is never itself attended to in contradistinction from its particular embodiment: it is to be found only in the apperceptive activity which gives interest and significance to the serial process as a whole.....an apperceptive system which has become organised in the course of previous experience. This system is the unity in which are combined the connected products of many particular experiences. It is therefore universal. But its universality is exhibited only in the general plan of synthesis by which particular objects of attention are interconnected so as to form an intuitional whole. The universal, as such, is not distinguished and identified." (c)

The question in which we are interested is how this universal or general element is applied in any given concrete case. It was maintained by Bishop Berkeley that if we tried to picture to ourselves an abstract idea such as 'man,' 'humanity,' &c., we did as a matter of fact always call up the image of an individual with some particular shape and colour. (d) Similarly Prof. Sully says that a general notion is always based on a mental image more or less distinct, and in this way includes a representation of something real. This is quite plain where the class represented corresponds

How general ideas  
are applied to con-  
crete instances.

(a) James, *Principles of Psychology*, Vol. I, pp. 472, 477.

(b) Höffding, *Outlines of Psychology*, p. 168.

(c) Stout, *op. cit.*, Vol. II, p. 188.

(d) Berkeley, *Principles of Human Knowledge*, Introduction, §§ 10,

with actually observed objects as 'man' or 'mountain.' (a) Mr. Marshall thinks that some general ideas involve images and some, as *e.g.*, 'theory of consciousness,' do not, but adds:—"It is not easy, for instance, to have in mind the concept 'man' without a constant tendency to appreciate the characteristics of special individual men." (b) It seems also to be generally admitted that it is impossible to intuit the general. For example Höfding says, "that general outline or pattern which we think of as filled up in different ways, cannot in itself be pictured. It shares the fate of all general ideas and requires an individual representation," (c) and speaks of the name as a substitute for the impossible intuition. So Wundt's view is that we have a particular idea but an accompanying consciousness that it has only a vicarious value, and that any other particular idea which belonged under the same concept could just as well be put there. When we do think of the concept 'man' in isolation, we have before us in our consciousness either the image of an individual man or the word 'man' (as vicarious sign), or perhaps a complication of the optic and acoustic image, and in all other cases, *i.e.*, except when we think of 'man' without reference to any context of judgment, the corresponding idea would be simply and solely a concrete particular idea. (d)

4. So far then we seem to have reached the result that when we think of a general idea we must either imagine some individual or we must have before us the word which denotes the class. Now if the judge or jury who are applying the test of the 'normal man' have in their minds any particular person evidently the test *ipso facto* loses its generality, for the individual cannot be separated from his surrounding circumstances and still remain an individual in any intelligible sense. There would here seem to be a dilemma for the man who maintains that he has a general standard in the 'normal man' by which to judge; if you abstract from the individual sufficiently to give him generality, nothing remains that you can picture, if on the other hand you leave him so definite that

---

(a) Sully, *The Human Mind*, Vol. I, p. 486.

(b) H. R. Marshall, *Consciousness*, pp. 116-7.

(c) Höfding, *op. cit.*, pp. 172, 173, 186.

(d) Wundt, *Human & Animal Psychology*, pp. 309-311.

you can picture him, he is no longer of universal application for the purposes of a test. It has, however, been argued by Dr. Ward that it is useless to ask what we imagine when thinking, *e.g.*, of triangle, or man, or colour, because we never do attempt to fix our minds in this manner upon some isolated conception. In actual thinking ideas are not in consciousness alone but as part of a context, and when the idea 'man' is present, it is always in some proposition or question as man is the paragon of animals.' Hence "what is present to consciousness when a general term is understood will differ, not only with a different context but also the longer we dwell upon it: we may either analyse its connotation or muster its denotation, as the context or the cast of our minds may determine. Thus what is relevant is alone prominent, and the more summary the attention we bestow the less the full extent and intent of the concept are displayed." (a) He then explains that the word acts as a bond which brings into the foreground of consciousness when necessary those elements—whether they form an intuition or not—which are relevant to the concept.

Now, it is not our intention to deny that we do sometimes think by means of words only, or at least without any appreciable image resulting, but it does not seem to be possible deliberately to use as a test a conception such as that of 'the man of average prudence' without in some way unfolding further to ourselves the meaning of the notion, and we do not admit that this can be done by merely repeating the name. Even Dr. Ward allows that in thinking we work ultimately with the ideational continuum: the word is but a symbol, a peg on which to hang ideas; its great utility lies in its applicability to an indefinite number of individual objects, and we are thus able by means of it 'to view a mental image as presenting features common to it and other presentations. In this way the image, though in itself an image particular and concrete becomes representative of an indefinite group of like things that is to say of a class.' (b)

---

(a) J. Ward, Article Psychology, Encyclopædia Britannica, 9th Edition, Vol. XX, pp. 76, 77.

(b) Sully, Outlines of Psychology, p. 264.



5. Our own belief is that consciously, sub-consciously or unconsciously, the judge or the juryman does in each case when he attempts to apply his test have in his mind a concrete individual who is no less a person than himself ; this is his mental image, and the question which he really asks himself is, does the defendant appear to *me* to have exercised prudence or not ? Should I have done the same, if I had been in his place ? And he answers this to himself, without any reference to any general standard or general rule at all, but merely according to his own individual experience and the idiosyncracies of his own particular disposition. Hence it results that so far from the test of ‘ the man of average prudence ’ being a general and universal one it varies with each individual who applies it, and the learned Chief Justice in the case of *Vaughan v. Menlove* quoted above accurately described his own test when using the phrase ‘ as variable as the foot of each individual.’

In other words the standard of the ‘ normal man ’ is simply neglected altogether and another standard is substituted for it, and this is the real explanation why “ the alleged uncertainty of the rule has been found no obstacle to its application by juries,” and why it had been found unnecessary for the Court to define a prudent man.

We shall shortly give some reasons for the view expressed above, but have first to consider an objection which no doubt will be raised, that when it is said that the judge and juryman decide entirely according to their individual experience, the fact is ignored that their experience includes the general rule ; the experience is in fact ‘ the psychic fringe ’ of Professor James and the ‘ apperceptive system ’ of Professor Stout alluded to above as helping to form the universal. It is so far allowed that by constantly observing and comparing instances in which prudence or reason is displayed by individuals, a general idea of prudence could be obtained. As Professor Sully describes it, first of all a number of concrete images are welded together into a generic image which is thus formed by assimilative cumulation. “ By such assimilations a cumulative effect is produced which has been likened to that of the superimposing of a number of photographic impres-

sions taken from different members of a class (*e.g.*, criminals) whereby only common features attain to distinctness, and so a typical form is produced.”(a) It is this cumulative effect which is the background or experience of the individual, and in virtue of which he is able to *recognise* the prudent individual when he sees him, to say in fact whether prudence has or has not been displayed. This no doubt would answer to M. Taine’s description of his abstract idea of the *Araucaria* plant “but my abstract idea corresponds to the whole class : it differs then, from the representation of an individual. Moreover my abstract idea is perfectly clear and determinate ; now that I possess it, I never fail to recognise an *Araucaria* among the various plants which may be shewn me ; it differs then from the confused and floating representation I have of some particular *Araucaria*.”(b)

There seem, however, to be two replies to this objection : Prudence, Reason or Judiciousness consists in the application of certain principles to the complicated realities of life. It is in Aristotle *φρόνησις* equivalent to practical reason, and has to do with particulars in the sphere of action, and not with universals, (c) and Sir F. Pollock expressly compares the average prudent man with the Aristotelian use of *φρόνιμος* in determining the standard of moral duty.(d) Being then so essentially relative to the occasion, as prudence is, and as such liable to indefinite variations, we have great doubt whether any such general idea of it, stripped of all its surroundings, could be formed, as *e.g.*, M. Taine formed one of the *Araucaria* plant. “Prudence, etc.,” can no doubt be given the meaning of a bare dictionary substantive, abstracted from the universe of life and as if it had no environment, but how can such an idea be used practically ? We have said elsewhere that meaning lies in application to particulars, and to decide a case of negligence without taking into consideration the mind, ability, etc., of the actor himself is like playing Hamlet with Hamlet’s part left out. A man cannot be abstractly ‘prudent’ apart from his particular acts that are the prudence. It is true

---

(a) Sully, *op. cit.*, p. 255.

(b) Taine on Intelligence (N. Y.), Vol. II, p. 139.

(c) Aristotle, *Ethics*, Bk. VI.

(d) Pollock on Torts, p. 422, note 1.

that, as a matter of convenience, we call a man prudent in abstraction from any one of his acts and may say that the acts follow from the existing prudence : but in the absence of each and all of the acts the man would not be prudent at all.(a) Such a general idea as could be created in the way explained above, would not be of much use for application to a new concrete case, and certainly would not correspond to what the lawyers profess to have in their standard of the 'normal man,' that is to say, a definite test capable of immediate application to any individual instance without need of any instructions as to its use.

Secondly, granting the formation of the notion required and allowing that each individual's experience has equipped him with it, we do not see how this would advantage 'the normal man' theory. What guarantee is there that the general notion which each has formed of prudence will correspond? Even though every exhibition of prudence may have some common characteristic, it does not follow that each individual will see it in the same light : neither does every man have the same experience nor yet the same mental endowment or education, and therefore, to assume that each must form for himself the same idea of Reason or Prudence is an evident absurdity. It is not a case which could be compared to men's notions of legal right and wrong, for there they have a code which is definitely laid down and to which they must conform : but with respect to prudence it is expressly said, *e.g.*, in the case of *Vaughan v. Menlove* already cited, that 'it is not for the Court to define a prudent man,' nor do we know of any law in which any such definition has been given.

Just as morality is relative and men's notions concerning it are everywhere different, so also must it be with prudence, and such a general notion of it as men are able to form will almost certainly vary in each case. But if so, how can the 'normal man' appearing in a different light as he will to each judge and juror, claim any longer not to vary? Or again, if the 'normal man' as represented by the general idea of prudence, is the same in each individual, what need any longer of his existence? Why not simply instruct each judge or jurymen to decide as it seems good

---

(a) Cf. W. James, *The meaning of Truth*, pp. 149-50, 263.



to him, because it will also seem good to everyone else, ex-hypothesi each having the same idea of prudence ?

6. It thus appears that neither in the form of a general image nor yet under the guise of the accumulative effects of past experience can the 'normal man' be said to have any existence in the minds of either judge or jury : that he exists outside any individual's mind whether in the regions of 'noumena,' 'things in themselves' or other like fictions we do not suppose to be asserted by anyone either in or outside of a legal text-book, many as are the fictions which they contain. That this is recognised by some lawyers is shown by the following passage : " There is no absolute or intrinsic negligence. It is always relative to some circumstances of time, place or person,"(a) and the same must be true of prudence the correlative of negligence.

We will now briefly assign our reasons for holding that the judge and juror in each case makes a mental image of himself when deciding the questions at issue.

It has been shown that if he could form a universal notion of prudence, it would be practically useless of application, and, although told to apply the standard of the 'normal man' no definition of such is given him by the Court—for the simple reason as it appears to us that the Court is unable to define him even if it would—what therefore would he be likely to do under such circumstances ? Obviously he will be forced to do the best he can with his own experience, and decide as his own inclination suggests, taking himself as the test.

In support of this view the following passages may be quoted : " Inasmuch, however, as we have no direct experience of what other persons actually feel, we can only gain the information by conceiving what we should feel, if we were in their place,"(b) and again to the same effect, " as we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel

(a) Dr. Rashbehary Ghose, *Law of Mortgage in India*, 3rd Edition, p. 488.

(b) Buckle, *History of Civilization*, Edition 1871, Vol. III, p. 310.

in the like situation.”(a) Under the term ‘feel’ these writers would no doubt include ‘thinking’ and similar attributes of the reasonable man.

So Prof. Sully writes that the knowledge of others’ mental states, thoughts, tastes and inclinations is obtained by means of an imaginative construction of situations and experiences that go beyond the limits of our individual life. We build up new representations from the materials supplied by our personal experience. We find out what is going on in other minds by help of our own individual mental experience.(b) Likewise Prof. Metchnikoff says that from the dawn of intelligence man has tried to judge the unknown from the analogies given by what he knows best, that is to say, by his own self. Thus he came to attribute to everything around him qualities like his own qualities and motives like his own motives.(c)

Nor is there anything astonishing in his so doing: no one would admit that he was not a reasonable man, and therefore when pressed it comes to this, that the ‘ordinary’ man is any one outside an asylum and varies according to each individual in the jury-box.

Because we stated our belief that the judge or juror, when he takes himself as the standard, has in mind a concrete individual, we were attacked by one critic on the ground that men cannot think concretely only but must reason deductively, and in this case we objectify ourselves as the prudent man and use this as the middle term. The syllogism we use is of the form “My experience tells me that a prudent man would have acted thus; therefore I have acted thus,” and we only argue from or to ourselves because we first convince ourselves that we are normal.

We do not plead guilty to this accusation. We have all along been aware that the logic books state that all reasoning is syllogistic in form and involves the use of a middle term which is in the nature of a general idea. But Psychology leads us to the conclusion that it is rarely that we actually do think in this way, and though our critic does go on to speak of the “non-philosopher’s intuition merely being exceedingly rapid or sub-conscious deduc-

---

(a) Adam Smith, *Theory of Moral Sentiments*, Vol. I, p. 2.

(b) Sully, *The Human Mind*, Vol. I, pp. 15 & 376.

(c) E. Metchnikoff, *The Nature of Man*, p. 138.

tion," we do not think that a convenient resort to the subconscious will meet the case that we are considering.

The following passages appear to us to describe accurately how man thinks in most cases :—" Thus he (the logician) assumes that all thinking takes place by what he calls concepts, whereas, as we shall see presently, our ordinary general ideas fall very short of the logician's concept. Again he supposes that such concepts are fully developed before they are combined in judgments, whereas the truth is, as we shall see also, that concepts are gradually formed by a series of judgments. Similarly he assumes that when we reason (deductively) we set out from a general truth in the way indicated by the syllogism, whereas the real movement of thought is, as will be shown, different from this. The Psychologist on the other hand, being concerned not with the question. " How can we think correctly ? " But with the question. " How do we ordinarily think ? " has to make a much more careful analysis of the actual processes of thinking, to bear in mind their complexity, their variability of form, and their deviation from the forms prescribed by the logician. Thus he has to keep in mind the fact that in our ordinary thinking we do not reach the logical concept, that we do not conceive or form general ideas without at the same time judging, and that our reasoning processes are at once less methodical and more variable in form than is assumed in logic." (a) The same writer subsequently explained that ordinarily the conclusion presents itself first before the ground of it, *viz.*, the previous experience, is realised : the ground or premisses of the conclusion, if they become distinct in consciousness at all, do so as an after-thought, being distinctly recalled only when it becomes necessary to set them forth because a hitch or difficulty has arisen. " We may say then that the act of drawing with full consciousness a conclusion from data or premisses, that is to say, the explicit act of reasoning as differentiated in its form from a mere judgment, rather appears as a part of the final revisional process of proof, than of the first process of spontaneous inference." (b)

---

(a) Sully, *The Human Mind*, Vol. I, p. 413.

(b) *Ibid.*, pp. 462-3.



The class of case which we are discussing appears to us to correspond to what is called practical judgment, in which there is direct transition to the conclusion without distinct apprehension of any ground or with apprehension only of a particular analogous case. Here the intellectual process is largely automatic and has a close analogy to action under the impulse of habit.<sup>(a)</sup> It is precisely in cases where we have to conclude as to the motives or reasons of other persons' conduct that it is very hard to connect the conclusions reached with any universal judgment,<sup>(b)</sup> and, such use as the judge or juryman may make of a middle term, is, we think, a very different matter from consciously identifying himself with the standard of the man of ordinary prudence laid down by the law. If the juryman does have any general ground present to him before he comes to his decision, which seems to us unlikely, the most he does, as we think, is to infer subconsciously or implicitly from the fact that he is a man that he would have acted in such and such a way in the case in question. That he only ventures to draw an inference as to what he would have done after satisfying himself that he is a normal man possessed of an average amount of prudence we do not credit. That implies an amount of conscious inference and explicit unfolding of the middle term 'man' in a particular manner which experience tells us is not employed. If everyone did go through such a process, then, unless the whole performance were a farce, it must surely happen sometimes that a man would come to the conclusion that he was not a normal man possessed of average prudence, and was therefore unable to say what he would have done in such circumstances. But can anyone quote such a case? Is an instance known of any person who has held himself unfit to pass judgment on the conduct of another on the ground that he was not satisfied that he himself was a man of normal prudence, and therefore could not say what ought to have been done in the case under discussion?

Further, it appears to us that the argument, if accepted, would prove too much. For if everyone acted in the way supposed there would be no need for the law to lay down any such standard as

---

(a) Sully, *Outlines of Psychology*, pp. 285—7.

(b) Sully, *The Human Mind*, Vol. I, p. 464.

that of the man of ordinary prudence. It would have its standard already in every individual, and all it would have to do would be to enjoin each individual to consider what he would have done in the matter. This would be quite safe, because, according to our critic, no one would venture to make an inference as to what he would have done unless first satisfied that he himself was a normal man possessed of an average amount of prudence. The whole of this doctrine put forth in such solemn words by Sir Frederick Pollock and others would thus really be a mere superfluity. But if so, how comes it that a man may act *bonâ fide* and to the best of his ability, and may use all the care of which he is capable and so forth,<sup>(a)</sup> and yet may not come up to the standard laid down by the law?

We may also add that the bare assertion that each person identifies himself with 'the man of average prudence' involves, at all events as a reply to us, an open begging of the question because we have contended that the nature of prudence is such that there is no such average person. Prudence being a quality which is only displayed with reference to particular circumstances by individuals of particular characteristics, no such identification as that suggested could, in our opinion, be made. The abstract idea of prudence is one of comparative emptiness apart from a particular context or environment; a duplicate edition of it (if it were possible) would be indiscernible and therefore identification with it impossible.

7. Indeed, one is disposed to think that jurors are sometimes actually directed to do what we hold they in fact always do, *e.g.*, commenting on the case of *Metropolitan Railway Company v. Jackson*, 3 App. Ca., 193, 47 L. J. C. P., 303 (1877), and the direction there given by Lord Cairns, Sir F. Pollock remarks "strictly the jurors have to say not whether negligence ought to be inferred, but whether, *as reasonable men* they do infer it."<sup>(b)</sup> Surely this is nothing but an invitation to regard themselves as the type of 'the reasonable man' for we cannot take the words to be merely otiose, and the learned author could hardly imagine that these

---

(a) See para. 10, post.

(b) Pollock on Torts, 6th Edition, p. 432 note (x).

men could project themselves out of their ordinary state of mind and take on a foreign personality corresponding to that of the normal man! For even granting that the conception of the normal man has been reached, such an achievement would require a power of abstract thinking far above the abilities of the ordinary jurymen.

A similar indication that what is really taken as the standard is in some form or other an individual test, is given in s. 151 of the Indian Contract Act. It is there enacted as follows:—"In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." Now, if the standard of the 'man of ordinary prudence' were an intelligible or applicable one, there would have been no need to add the words 'take of his own goods . . . bailed:' the real test, however, is contained in these words, and the rule simply is that a bailee must take the same care of the goods bailed to him as he would of his own. That standard can be applied, because everyone knows how much care he would take of his own goods, and the addition of the words 'as a man of ordinary prudence' makes just no difference at all to the way in which the section will be used. If they were altogether omitted no one would be any the worse, so far as utility goes, though perhaps, they might be less mystified. It is true that it seems to have been held<sup>(a)</sup> that the fact that the bailee's goods were lost at the same time is not sufficient ground for acquitting him of negligence with regard to the bailor's goods, but we submit that in the absence of proof of some most unusual conduct on the bailee's part with respect to his own property, the contrary inference should be drawn, and if it is not, the failure to do so is due to a mistaken attempt to give some definite meaning to an impracticable phrase.

We venture to point this out as one mischievous effect of endeavouring to apply an unmeaning or impossible test. Another example may be taken from s. 16 of the same act. 'Coercion' is there defined as the committing, or threatening

Protest against attempts to extend the doctrine of the normal man.

---

(a) *Doorman v. Jenkins*, 2 A. & E., 256, quoted on p. 365 of Cunningham & Shephard's 9th Edition of Indian Contract Act.



to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. On this the Commentators remark<sup>(a)</sup> that in the Roman and English systems fear is not regarded as a ground for avoiding a contract, unless it is the present well-grounded fear of a man of *ordinary firmness*: they also quote a decision to the effect that “The fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that *ordinary degree of firmness* which the law requires all to exert,”<sup>(b)</sup> and, finally, while admitting that in this act “the notion of coercion is purposely extended, and there is nothing to limit it to such acts or threats as might be supposed to exercise a constraining force upon a man of ordinary firmness,” so enamoured are they of the doctrine in question that they go on to add “nevertheless the circumstance that the threats employed were not of that character would be ground for inferring that the person’s consent was not really caused by them.” We entirely dissent from this opinion, as it assumes that all individuals are alike in disposition or that if they are not, they ought to be. It seems to us clear that instead of drawing presumptions from what one chooses to regard as the normal man, and so in fact basing the decision on a law of averages, the circumstances of the particular case should be the only guide as to whether the person in question was or was not frightened into entering into the agreement.

The first contention then is that ‘the normal man’ has no real existence of any kind; the second is, that  
 Summary of objections. if he does exist, he is not capable of application in the sense claimed, and that attempts to apply the notion have mischievous results. What is actually applied in his place, we have already explained. But we further assert that even if he did exist and could be applied at all, he would have to be applied in so many different forms, that to speak of him as constituting a universal standard would be simply futile, and finally that the application of such a standard must, on general grounds, result frequently in injustice.

---

(a) Cunningham & Shephard’s I. C. Act, 9th Edition, pp. 54, 55.

(b) *Skeate v. Beale*, 11 A. & E., 983.

8. The fact that in order to apply such a standard the normal man must necessarily take on different forms according to circumstances, will not take long to demonstrate. Indeed, it follows from the nature of prudence or reason itself and the relativity of its character already alluded to. For, surely no one will maintain that the same standard of prudence can be expected from a child, a woman and a grown-up man; and it would therefore seem at the outset that we must postulate three separate standards, *viz.*, that of 'the ordinary child,' 'the ordinary woman,' and 'the ordinary man.' But again we cannot stop even here; caution, prudence, reason and similar qualities are forms of self-control, which is against the natural instinct and the tendency of ideas to pass into action, and they come therefore only with the highest and most developed races. To seek to apply the same standard at all stages of development is to attempt the impossible: for no sane person can neglect the differences of temperament and race, and can really believe that the average Burman can be bracketed side by side with the average Englishman, and the same reason and prudence demanded from each on every occasion. Nay, to go even further within the race itself, are the ploughboy and the advocate, the cooly and the township judge to be treated alike, but must we not rather have a normal example of each class?

And here we must pause to point out what is actually going on at the present time. Taking ourselves, as we do, as the representative of the normal man, English barrister judges and men of another race who have never been among the people nor know anything of their language or customs, are daily referring to precedents taken from another country, and taking their own minds as the standard by which to judge whether the Burman villager has or has not been guilty of negligence; and yet, if someone described them as the same as a ploughboy or as a Burman cultivator, they would be the first to resent it, and they would claim to be something higher at least intellectually, if not also morally. Or do these judges delude themselves into the belief that European and Asiatic alike, the ploughboy, the township judge, the advocate and even the pig—for it seems that Bramwell, B., had a standard

also of ‘pigs of average vigour and obstinacy’ (a)—are somehow one and all included in that mysterious entity the normal man or pig? Either this, or they must claim to project themselves into the frame of mind of persons, and it seems even of animals, of whom and which they know nothing whatever, whenever it is required, or else they must confess that they are neglecting the ordinary facts of daily life and dealing with imaginary beings and imaginary circumstances.

If they assert the former, we will then refer the reader to our remarks on differences of race, experience and imagination, and pass on, after merely premising that the analogy of Aristotle’s *ὁ φρόνιμος* or *ὁ σπουδαῖος* (i.e., the prudent or good man), will not help them here, although Sir F. Pollock has called him to his aid. (b) For the *ὁ σπουδαῖος* is the man imbued with the spirit of his community, as has been pointed out by Mr. Bradley, (c) and can only say according to it what is right or wrong: he cannot say it for another community. It seems plain therefore that he certainly would not be represented for the Burman by the English Barrister Judge but rather by the Burman Myook or the village headman, whose opinions the Barrister Judge usually scouts if they do not agree with his own. You cannot have a cosmopolitan *ὁ σπουδαῖος*, any more than you can a universal man of ordinary prudence, as we have already shewn. But if the latter be allowed, we will ask what kind of justice is likely to be administered under such circumstances, and whether it is not rather a high price to pay for the possession of a normal and universal rule?

Now, it does seem to be in a way admitted by some lawyers that the various considerations which we have enumerated cannot be left out of sight, but they do not appear to perceive how such admissions strike at the root of the universality and generality of their test. Thus, in his treatise on Contracts Sir Frederick Pollock writes: “Improvvidence is nothing else than the want of that degree of vigilance which a man of ordinary prudence may

**Virtual admissions of the truth of our contention.**

(a) *Child v. Hearn* (1874), L. R., 9 Ex., 176; 43 L. J. Ex., 100.

(b) Pollock on Torts, p. 422, note (1).

(c) F. H. Bradley, *Ethical Studies*, p. 177.



be expected to use in guarding his own interest. Now, one man's deliberation and prudence are not the same as another man's, nor is the same man equally deliberate or prudent at all times. A man may enter into a contract with less deliberation than the average wisdom of mankind would counsel, or than he himself commonly uses, in affairs of the like nature, and yet the contract may be perfectly valid." And again, " Surprise or improvidence represents nothing but an opinion of the general character of a transaction, *founded on a precarious estimate of average human conduct.*" (a) Further, in the notes to s. 151 of the Indian Contract Act (b) we find " The Court has . . . . to determine what a man of ordinary prudence would have done with his own goods under the circumstances. It must, therefore, take into consideration the state of society, the general usages of life, and the danger peculiar to the times, as well as the apparent nature of the object of bailment and the degree of care which it seems to require." Remarkable as this is for its omissions with respect to the individual, it does so far advance as to include the state of society, and the general usages of life within the scope of its enquiry, which gives an opening for differentiating between races and stages of development.

Sir F. Pollock, however, appears to go further, for citing a dictum of Grove, J., in *Smith v. Green* (1875), 1 C. P. D. at p. 96, that " normal or likely or probable of occurrence in the ordinary course of things, would perhaps be the more correct expression ;" he criticises it as follows :—" But what is normal or likely to a specialist may not be normal or likely to a plain man's knowledge or experience." (c) This is a serious lapse from the path of Universality, and it is not the only one : to quote again from the same author : " The normal measure of the caution required from a lawful man must be fixed with regard to other men's normal powers of taking care of themselves, and abnormal infirmity can make a difference only when it is shown that in the particular case it was apparent. On the other hand it seems clear that greater

---

(a) Principles of Contract, pp. 634, 636.

(b) Cunningham & Shephard, *op. cit.*, p. 365.

(c) Pollock on Torts, p. 35, note (n).

care is required of us when it does appear that we are dealing with persons of less than ordinary faculty.”(a) Finally, he roundly asserts a kind of supplementary principle, which he expressly states is not to be taken as an exception or extension, but as a ‘necessary application of the general rule,’ to which he gives the name of ‘the particular duty of competence.’ This, it seems, is specially intended for skilful persons, and to use his own words “the practical result is that the diligence required in the case in hand will be, according to circumstances, an ordinary man’s or some particular kind of expert’s.”(b)

The law of ordinary prudence has thus now become that of extraordinary prudence, and the caution against regarding it as an exception to the general rule was certainly needed. But surely it is time to abandon a principle when, in order to save it, you have to assert a supplementary law which is a direct contradiction of the main one. We sympathise with Sir F. Pollock when he complains of the difficulty he sometimes has in applying his standard of a reasonable man’s prudence,(c) and we do not in the least doubt it : or again we recognise his manful attempt to make the decision in *Eckert v. Long Island R. R. Co.* (1871), 43 N. Y., 502 ; 3 Am. Rep., 721, square with the theory of natural and probable consequences, though we were not previously aware that the law took such charitable views of mankind,(d) but we cannot allow that he has successfully accomplished his task.

9. It now remains to show that the application of the rule, if it were possible, would frequently result in injustice. For this we will revert to the case of *Vaughan v. Menlove* previously cited and quote again the argument by which a new trial was obtained, viz., that the jury should have been directed to consider “whether he (*i.e.*, the defendant) had acted *bonâ fide* to the best of his judgment ; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence.” To this Sir F. Pollock objects that ‘it mis-

Why the application of the general rule must often cause injustice.

(a) Pollock on Torts, pp. 440-441.

(b) *Ibid.*, p. 424.

(c) Pollock on Torts, pp. 459, 460.

(d) *Ibid.*, p. 464.

represents the rule of law: not the highest intelligence, but intelligence not below the average prudent man's, being required.' (a) This is true, but it does not affect the principle of the argument which appears to us to be entirely unanswered by the reasons which the Court of Common Pleas gave for rejecting the view urged. For either the defendant answered to the 'reasonable man,' in which case it was right for them to take his standard as the test, or he did not; and if he fell below the normal man, then you were evidently demanding a higher standard from him than it was possible for him to attain to. All men are not alike, and some men must clearly be inferior in prudence to the normal man, for he is avowedly the man of *average* prudence, and all averages are reached by taking the mean between inferiority and excess. Those, therefore, who seek to apply the test of the normal man must avowedly expect and preach what is for some men an impossibility, and it is of no use to assert that such men ought to have trained themselves beforehand to be the reasonable man, unless you can first show that all men even with training can reach that standard, and further what that standard is. How you will even set about proving such a problem, for ourselves, we are unable to conjecture.

Further it is a misuse of a concept to employ it to exclude what it is not expressly defined as including. This is what the law does with its abstract conception of a man of ordinary prudence, as it omits to take into consideration individual powers and circumstances and so denies to things the very properties with which the things sensibly present themselves. The concept is itself unreal being a type of man pictured as guided by reason only, and so it excludes from the category of prudent the man who is influenced in his actions by feeling, sentiment as well. Yet it is the latter kind of man whom we find in life and to whom this standard often denies the attribute of the prudence required: he naturally feels that his responsibility is with reference to his own acts and intentions and resents being judged not by what he thought and did but by what the normal man does or would have done.

---

(a) Pollock on Torts, p. 423 and note (n).



It is not improbable that some lawyers will admit that there is much truth in what has been said, but will nevertheless maintain that the advantage or necessity of having one general rule is so great that it is advisable to employ it, even though some individuals may suffer injustice thereby. It is in anticipation of this that we have devoted so much space to an attempt to show that the general rule in question is a delusion, and is not as a matter of fact really applied at all, though vain and fanciful attempts are sometimes made to use it. And if the question be asked, why if it is not in fact used, we so strongly object to it? Our reply is, that not only do the attempts to use it in themselves do harm—of which examples have been given and more could, if necessary, be collected—but also that this sham standard by its very acceptance stands in the way of the adoption of a better one. Nor is it necessarily incumbent on us to suggest a new test, before condemning one that is bad: but we will go so far as to say that we regard any search for the real or typical expression of reason or prudence as fruitless: we should rather confine ourselves to the details of each particular case, and should ask how any given expression of it came to exist, and seek in each instance for some causal explanation.

10. That some legal authorities are not satisfied with the manner in which the law treats cases of negligence is clear from Sir William Markby's remarks on the subject. He points out that negligence has been used by lawyers in two ways. First, it had reference to the state of mind of the party doing the act: as such it was opposed to intention and was equivalent to rashness or heedlessness, implying that the person had either adverted to the consequences of his act without desiring or expecting them, or had not adverted to them at all, the occasion being one on which the law required from him a certain degree of circumspection. It thus included the idea of the omission of a duty or breach of a duty. Hence it was manslaughter when death ensued in consequence of the omission of a duty which arose from negligence,<sup>(a)</sup> and it is said in discussions about negligence that negligence alone is not a sufficient cause of action without a breach of duty.<sup>(b)</sup>

---

(a) *Q. v. Hughes, Dearsley and Bell's Crown Cases*, p. 249.

(b) *Dutton v. Powles*, L. J. Reports, Vol. XXXI, Queen's Bench, p. 191.

Latterly, however, quite a different meaning is given to the term. "Negligence is declared to describe not the state of mind of the party who does or does not do the act; not the absence from his mind of certain ideas which might have led him into a different course of action or inaction, which state of mind he might have avoided and which ideas he might have recalled by a proper use of his faculties—not in short that which I understand by the word heedlessness: not again the hasty and ill-grounded expectation that results will not follow, which I understand to be expressed by rashness; but the absence of diligence and even of skill, and moreover not the absence of that diligence or skill which the party under the circumstances was able to exercise, but of that diligence, or skill, which under the circumstances the law requires. So that whatever be the exact nature of the qualities to which we ascribe these names, the conduct of the person is not at all what is considered, but whether he has fulfilled a special obligation which he has incurred." After giving some instances,<sup>(a)</sup> he proceeds:—"It is obvious in these cases.....that the term 'negligence' is used to express something wholly independent of the conduct of the person whose act or omission is under consideration. The workman's negligence consists, not in heedlessness of the act which he is doing or omitting, or its consequences; not in his omitting to use all the care of which he is capable; but in his omitting to use the care which a skilled workman would use, whether he is himself capable of it or not. It is simply the omission to perform a positive duty, and in this particular case a positive duty which arises upon a contract." He then enters a caution against "sliding, without perceiving it, from this meaning of the word 'negligence' into that other meaning of it, where it expresses rashness or heedlessness, as so easily happens when a word has several meanings not wholly disconnected." Finally he concludes that the law's definition of negligence in either of these senses tells us "just nothing at all." "To say that a man is liable for negligence, and to define negligence as the omission

---

(a) *Swan v. The North British Australian Co.*, L. J. Reports, Vol. XXXI, Exchequer, p. 437, and *Grill v. The General Iron Screw Colliery Co.*, L. R. Common Pleas, Vol. I, p. 612.

to do that which the law requires, only brings us back by a very circuitous route to that which we have above said ought to be the first step in the inquiry—namely, what is the duty which the law imposes upon us. Now as I have already pointed out, in a very large class of cases the discussion of liability turns exclusively upon the question whether or no there has been negligence. If, then, it is true that the word ‘negligence’ in these discussions means no more than the authorities to which I have referred represent it to mean, then it is obvious that this discussion simply revolves in a circle. What is a tort? The breach of a duty. What constitutes such a breach? Negligence. What is negligence? The breach of a duty. In this way we shall never arrive at a result.’’<sup>(a)</sup> We have quoted this passage for several reasons. In the first place, it appears to confirm our assertion that the standard of an average or normal man does not tell us anything whereby to decide a case, for Sir William Markby is emphatic that neither definition of ‘negligence’ as given by the law is of any value.

In the second place, it makes it quite clear that, according to the latest legal authorities, a man is not held liable in negligence cases because of some defect in his state of mind. It is simply because he fails to come up to some standard which the law has set. A friendly critic of the first edition of this work wrote: “I suspect that what the law means to punish is not the absence of prudence. Real lack of ordinary human prudence would imply either mental deficiency or exceptional ignorance of life, both of which ought to be excusable. I believe that it is action in defiance of the dictates of prudence which the law means to censure, *i.e.*, it is the bad will not the dull mind which is punished.” But, surely, it is plain now that this is not the case: so far from looking at the will in the matter the law condemns without reference to the party’s state of mind.

Thirdly, we would draw attention to Sir William Markby’s caution against sliding without perceiving it from one meaning of negligence, namely, that of rashness or heedlessness, to the other, *i.e.*, failure to fulfil a special obligation which has been incurred.

---

(a) Markby: *Elements of Law*, pp. 330—334.



This was what another critic did who stated that in civil law we had to decide *firstly* what knowledge did the actor possess at the moment immediately preceding the action impugned, and *secondly*, given this knowledge, was his action prudent or not imprudent according to the standard of prudence of the normal man. He then explained that the normal man possessed the same prudence as everyone else other than the exceptional or abnormal individuals of society, among whom were the man always getting into trouble and the duffer. These the law as representing the social conscience condemned and mulcted in damages for their actions affecting others. Now it is evident that, according to Sir William Markby's exposition of the present legal view, the law does not consider at all what knowledge the actor possessed immediately preceding the action impugned. As we asserted in the text, it takes no notice of this, and says instead that whatever the man's knowledge may have been he must display a certain standard. The critic's assertion that the law does consider his actual state of mind combined with the remarks about the man who is punished being a duffer, indicates that he desires to represent that the man is really punished for his bad will which is shown by the fact that he is always getting into trouble, and that the standard or normal man is only used as a test for ascertaining that the will is bad. In fact, it is because the actor is rash and heedless that he has to pay. According to the law, however, the standard man is not used for this purpose, but to ascertain whether the man's skill or knowledge was up to that mark which the law requires in the said case. It is really due to this same confusion of the two senses in which 'negligence' has been understood by the law, that we get another very similar kind of defence of its doctrine. It is said that the "normal man" has been wrongly taken by us to mean the average man in the mathematical sense: the law does not really require everyone to come up to such an average but only to exercise a certain *minimum* amount of prudence. We have not found this actually stated in any legal text-book, but it is true that Professor Sheldon Amos writes:—"Law prescribes in all countries a certain *minimum* of mental alacrity and assiduity to be exhibited by all persons in the community under various circumstances, and for some persons, under some circumstances, prescribes

a special amount of such alacrity and assiduity, very far exceeding the *minimum*. Such a prescription is absolutely necessary in order to secure the common advantages of civil intercourse; for in default of such a prescription, every one's personal security, reputation and health would be at the mercy of every other person who might choose to indulge himself in thoughtlessness and reckless intrusion upon his neighbours." He adds that each must see that his acts do not interfere with the rights of others and the amount of watchfulness which he must exercise will be determined by the extent of those rights: he will therefore be liable if he does not take all the care exactly defined by law as needed to be shown under the circumstances. The absence of this amount of care is what the law calls negligence."(a)

If by the use of the word '*minimum*' it is intended to imply that the law prescribes a less standard than that of the prudence of the average man in the sense of the arithmetical mean, we take it that the object of this manner of putting it is to represent that everyone can reach the standard required, and, if he does not do so, it is due to some fault on his part. He would then be condemned on account of his bad will in not reaching a point to which it was in his power to attain. His negligence is thus considered with reference to the state of his mind as indeed is indicated by the use of the words 'thoughtlessness' and 'reckless intrusion.' This, however, is clearly not the same idea as that conveyed by negligence in the second sense, namely, of the workman who promises to use the ordinary skill of his craft when he undertakes a work and so forth, in which the state of the party's mind is not considered. But the two senses are confused because the passage also speaks of a degree of care exactly defined by the law as needed to be shown, which implies that some standard and not the state of the party's mind is to be the test. What, however, we think may safely be said is that, it is nowhere laid down that, if a person displays a minimum degree of care or prudence which is less than that possessed by the average man in the sense of the arithmetical mean, he will not be liable for negligence. On the contrary such a doctrine seems to

---

(a) S. Amos: Science of Law, pp. 115-6.



be inconsistent with several passages to which we can point, *e.g.*, that it is not sufficient for a man to take the same care of another's goods as he does of his own.(a) Or again, "on the other hand, it is not enough to show that the person accused acted *bonâ fide* or to the best of his skill or judgment. The rule requires in all cases a regard to caution such as a man of ordinary prudence would observe."(b) Clearly according to this a man with every good will in the world may fail to reach the required standard, so, therefore, whether it is called a *minimum* or an average one, the result seems to be much the same. Further, one cannot help reflecting that, if by *minimum* is intended a standard to which every one except a regular fool can attain, the maxim "*spondet peritiam artis*" quoted by Sir William Markby as the foundation of the use of negligence in the second sense would be of little value. It is of no use to the party with whom you contract if you are only taken to guarantee such a very low standard.

11. The framers of the theory of 'the normal man' appear to have been mistaken on two points: they  
Errors of the framers of the theory. wrongly imagine that the individual can be isolated from his surroundings and remain the same, and they have further an erroneous conception of what a universal standard is. The first is the old fault of the Utilitarians when they founded their morality on the idea of each unit seeking his individual pleasure apart from all the other units, whereas the self is characterized, determined, made what it is by relation to others.(c) Or as Wundt puts it, the surrounding circumstances actually alter a fact: this is the law of relativity, applicable alike in sensations and all mental states: "we never apprehend the intensity of a mental state as if it stood alone."(d)

Nor again can you make a universal standard by abstraction which will result in anything but a mere form. This also has been pointed out by Mr. Bradley, "that the good must be formal we might have seen by considering its character of a universal standard or test. Such a standard is a form or it is nothing. It is to

---

(a) See para. 7 ante.

(b) J. D. Mayne: The Criminal Law of India, p. 618.

(c) Bradley, Ethical Studies, p. 105; & Appearance & Reality, p. 425.

(d) Wundt, Human & Animal Psychology, p. 119.



be above every possible this and that, and hence cannot be any this or that. It is by being not this or that, that it succeeds in having nothing which is not common to every this and that, otherwise there would be something which would fall without its sphere ; it would only be one thing among others, and so would no longer be a standard. But that which can be common to every thing is not matter or content, but form only. As no material test of truth, so no material test of morality is possible.”(a)

Instead, however, of grasping this point our judges and lawyers have compromised between the form and the matter, and tried to unite two inconsistent elements in a universal rule ; they have made their man typical or general, but the circumstances under which he is to act particular. For the standard which they recommend is not how the normal man would act under normal or general circumstances, but under the given circumstances, *i.e.*, the circumstances of the individual whose case they are deciding. But for this addition of course the doctrine would be so transparently useless, that it would be idle to urge its adoption ; and so it is that their test, or rather self-contradictory attempt at a test, has preserved the appearance of applicability. It is, however, only an appearance and cannot be otherwise, the nature of reality being what it is. “Roundly stated,” says Dr. Ward, “the real is always concrete, the symbolic is always abstract. The real implies individuality more or less ; the symbolic is always a logical universal. Within the range of our experience the real implies always a history, that is, places and dates, converse with a concrete environment. The symbol is the creature of logic. If temporal and spatial relations enter into its definition or description, they are time and space co-ordinates with no vestige of chronology or topography about them.”(b) And again, “Life is wholly an affair of the real and individual : we cannot perform abstract acts or experience abstract events ; everything here has not merely general properties but a unique setting, and counts only so far as it has meaning and worth.”(c)

(a) Bradley, *Ethical Studies*, p. 131.

(b) J. Ward, *Naturalism and Agnosticism*, Vol. I, pp. 179-180.

(c) *Ibid.*, Vol. II, p. 170.

So long as political economy was regarded as an abstract science, like mathematics, which dealt with the 'economic man,' who was guided solely by considerations of wealth, so long it failed to have any influence in daily life because men felt its propositions to be inapplicable there. Just so with the legal doctrine of the normal man, it will not apply to daily life : (a) but here, as lawyers will not allow that their business is not with real men and real conduct, and maintain that the legal sense is always the natural one, (b) they have striven by the use of supplementary laws and other devices to make their theory cover the facts of each case as it arises ; hence the theory itself has in the end been adapted and transformed, until from the stones which they are forced from time to time to add there results the existing legal mosaic, a fit and characteristic monument of their handiwork.

---

(a) NOTE.—The parallel drawn is solely between the abstract character of the 'economic man' and of the 'man of ordinary prudence.' This is explained as one critic read into the words a supposed analogy between prudence as used in the legal expression and prudential motives as employed in political economy, and then stated that the analogy entirely failed.

(b) Pollock on Torts, p. 421.

## CHAPTER VIII.

### CAUSATION.

Importance in Law—Species of Causes—Causal Uniformity—Origin of the popular idea of cause—Change, unconditionality, spatial and temporal relations in Causality—Relevancy—Occasion, Opportunity, Condition—Instances of Cause in the Indian Evidence Act—Proximate and Immediate Cause—Necessary and probable consequences—Remoteness—Real, Decisive Cause—Examination of Cases illustrating the rule of necessary and probable consequences—Sir J. F. Stephen's treatment of Causation in cases of homicide examined—his attempt to use the criterion of directness and immediateness of connection—his confusion of motive and cause—his inclusion of intention in causation.

IN this chapter we are avowedly entering the region of metaphysics and the reader who is afraid of them is therefore advised to omit it. At the same time, if he chooses to persevere he will find references both to psychology and law, for causation is a subject with which psychology to some extent is forced to concern itself, and legal text-books usually attempt to handle it, though in a *dilettante* and inadequate fashion, as far as our experience goes.

This, indeed, is really somewhat surprising considering how important a part the causal conception plays both in legal evidence and other branches of law. Without it we should find it extremely difficult to arrive at any adequate idea of what "relevancy" means: in fact the original definition given of it was the connection of events as cause and effect.(a) Professor Edmund Robertson quotes the general definition of relevancy in Stephen's Digest as follows:—"Facts whether in issue or not, are relevant to each other when one is or probably may be, or probably may have been—the cause of the other, the effect of the other, an effect of the same cause, a cause of the same effect—or when one shows that the other must or cannot have occurred, or probably does or did exist or not; or that any fact does or did exist or not, which

Importance of Causation in law.

---

(a) J. F. Stephen, Introduction to the Evidence Act, Edition 1893, 68.



in the common course of events would either have caused or have been caused by the other," and himself, regarding the causal connection as the key of the explanation of relevancy, remarks that the exceptions to the rule excluding collateral evidence in Stephen's Digest, will be found to be all cases of the general rule of relevancy. "Some bond of connection as cause and effect will be found to have been established between them." (a)

Section 7 of the Indian Evidence Act runs as follows :—

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction are relevant."

Turning to other branches, *e.g.*, that of civil liability for torts, we find a doctrine of 'natural and probable consequences,' a distinction between 'immediate,' 'proximate' and 'remote' causes, a doctrine of 'reasonable and probable cause,' &c., (b) all of which are important principles, while in the region of contracts ss. 14, 15, 18, 19 and 22 of the Indian Contract Act show the desirability of understanding causality. It is therefore unnecessary to go further in order to justify our introduction of so metaphysical a problem as that of causation.

2. The difficulty of causation is in part due to the different aspects in which it is viewed combined with the fact that these aspects are all described by one common name. Thus, Aristotle found it necessary to divide it up into four kinds, *viz.*, the Formal, the Material, the Efficient and the Final Cause. Of these, the first two have dropped out of use, but the two last still remain, though it is chiefly in Psychology, Biology, Metaphysics and some forms of Theology, that the Final Cause has influence. Its basis, however, is like that of the efficient Cause, in our own experience, *i.e.*, the experience of our own conscious adaptation of means to ends in our volun-

---

(a) Article "Evidence" Encyclopædia Britannica, 9th Edition, Vol. VIII, p. 740.

(b) Pollock on Torts, pp. 30, 36, 220.

tary actions,(a) and the only place in law where this conception intrudes, so far as we recollect, is in the realm of motives and conduct. As these are fully treated of elsewhere, we shall not delay over them here, but shall be content to remark that the popular idea of cause is not derived from this species of causation which is usually rather expressed by the term 'end' or 'purpose.' It is easy, however, to confuse this notion with that of the Efficient Cause, and such a confusion appears to have taken place, *e.g.*, in the following note to s. 8 of the Indian Evidence Act :—" A motive is, strictly what its etymology indicates, that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars of external situation and conduct will, in general, correctly denote the motive for criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence."(b)

When the Final Cause has been eliminated, there yet remains room for a confusion between the idea of the Causal Uniformity. Efficient Cause and the scientific conception of law. On this point we cannot do better than quote Dr. J. Ward, who has clearly pointed out that Scientific Causality excludes Efficiency: " But neither space nor matter, neither time nor motion, affords any place for causal activity in the only form of it of which we have any immediate knowledge. Hence, it behoves us to realise, what most expositions of causation ignore or deny—I mean that causation and causal uniformity are entirely distinct. An efficient cause is not necessarily uniform in its action, and uniformity of sequence does not directly imply such causal intervention."(c) And again, speaking of nature, " the conception of efficient cause lies beyond its bounds ; it recognises law, orderly sequence of events ; but it neither asserts nor denies what we know as activity and passivity."(d) " So soon as laws are

---

(a) G. E. Underhill, *The Use and Abuse of Final Causes*, Mind, N. S. No. 50 pp. 230-231.

(b) Ameer Ali and Woodroffe, *Indian Evidence Act*, 5th Edition, p. 140.

(c) J. Ward, *Naturalism and Agnosticism*, Vol. II, p. 241.

(d) *Ibid.*, p. 242.

defined as constant relations, so soon reason compels us to look beyond them, such a definition brings the ground and source of the relation nearer instead of removing them farther off. Relations may hold, but they cannot operate; they may subsist, but they cannot exist in the absence of the things to which they pertain.”(a) This distinction seems to have been overlooked or ignored in the definition of cause given, *e.g.*, in s. 14 of the Indian Contract Act: “Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake,” for such a definition appears consistent with mere co-existence or invariable sequence, and would in fact be an instance of causal uniformity rather than of causation as usually understood.

3. “Even if the terms,” says Sir F. Pollock, “were used by lawyers in a peculiar sense, there would be no need for apology; but the legal sense is the natural one.”(b) It is presumed, therefore, that when legal writers employ the term ‘cause,’ they intend by it what is usually meant in ordinary parlance. An effort must now be made to try and fix what this ordinary meaning is. The first step is to trace the origin of the plain man’s idea of cause, and this is almost certainly found in the notions of ‘force,’ ‘power’ and ‘constraint’: inasmuch further as we have a direct consciousness of this only in our actions and volitions, it is doubtless from the side of our own mental life that the conception is first obtained. “It is, indeed, only when we ourselves produce an effect by the use of our muscular powers that we have a direct consciousness of causal agency, so far as this involves the idea of force or power. Hence, it seems natural to suppose that the race and the individual acquire their first dim apprehension of the causal relation through the observation of their own actions.”(c) Similarly, Professor Höffding: “We assume a causal relation whenever we discover that two phenomena are linked together in such a way that the one unavoidably makes its appearance when the other is given. According to the popular conception of the causal relation, one thing

---

(a) J. Ward, p. 278.

(b) Pollock on Torts, p. 421.

(c) Sully, Outlines of Psychology, p. 276.



is the cause, another thing the effect. The difficulty which might be found in things supposed to exist independently having yet so much to do with one another as must be the case with cause and effect, is from this standpoint easily overcome. A creative or constraining power is attributed to the thing called 'the cause.' The causes are personified, have ascribed to them something analogous to the personal exertion of will." (a)

Not merely, however, is the causal relation derived from our own mental life, but it is in the first instance a purely subjective affair, *i.e.*, it is simply the way we look at things outside us, as is clearly pointed out by Professor Stout: "The popular use of the word 'active' is roughly co-incident with the popular use of the word 'cause.' Among a group of factors which occur in a process leading to a certain product, agency is attributed to that which, for whatever reason, seems to play the most important, impressive or interesting part. A man ran over and killed by a passing train may have been standing on the line by accident, or he may have deliberately placed himself there with a view to suicide, or he may have been pushed there at the critical moment by another person. In the first case we should probably say that the train killed him: in the second that he killed himself, and in the third that the person who pushed him was the agent of his destruction. If he placed himself in front of the train in consequence of the ill-treatment to which he had been subjected by some one else, we doubt whether to regard the event as a suicide or as a murder. It is obvious that this mode of regarding agency is unscientific, inasmuch as it depends on the point of view which happens to be taken by the external observer. Where scientific explanation is required, each of the contributory factors concerned in a process must be regarded as active precisely in so far as it determines the nature of the result." (b)

So also Dr. Ward says: "It is not then in the relation of one *objective* change to another that we first find causation; that is rather where we put it in order intellectually to assimilate or synthesise. . . . The activity and passivity that are,

---

(a) Höfding, *Outlines of Psychology*, p. 209.

(b) Stout, *Analytic Psychology*, Vol. I, p. 144.

at least *primâ facie*, facts of individual experience, constituting what we call the inter-action of subject and environment, we transfer by parity of reasoning to what we regard as the inter-action of object and object in universal experience.”(a)

It is important not to miss the point to be drawn from these quotations, *viz.*, that the Causality is not so much in the events themselves as in what we choose to pick out as the cause from a number of antecedent phenomena. It explains much, including the distinction between cause and condition, as we shall illustrate later, and therefore at the risk of being tedious we shall enforce it by further quotation now. Thus Mr. Bradley, speaking of the attempt to define the cause as ‘the sum of conditions,’ says, “if we want to discover a particular cause (and nothing else is a discovery), we must make a distinction in the ‘sum.’ Then, as before in every case we have conditions beside the cause; and, as before, we are asked for a principle by which to effect the distinction between them. And, for myself, I return to the statement that I know of none which is sound, we seem to effect this distinction always to suit a certain purpose; and it appears to consist in *our* mere adoption of a special point of view.”(b)

4. We have not, however, yet exhausted all the ideas which the plain man contrives to utilize at one time or other for his notion of cause. We have still to deal with the conceptions of ‘change,’ ‘unconditionality’ and the temporal and spatial relations. “We may regard cause as an attempt to account rationally for change,” says Mr. Bradley,(c) and again, “activity implies the change of something into something different”(d) but it is hardly necessary to linger on this, because it is obvious, to quote Professor Höfding, that “if everything were uniform and unchangeable we should have nothing about whose cause we could enquire. The relation of Causality presupposes the occurrence of an event.” We only notice it because it goes to enforce the idea of activity,

Change, Unconditionality. Spatial and Temporal relations in the causal connexion.

(a) Ward, *op. cit.*, Vol. II, pp. 238-9.

(b) Bradley, *Appearance and Reality*, pp. 67-68.

(c) Bradley, *Appearance and Reality*, pp. 54, 64.

(d) Höfding, *op. cit.*, p. 56.



which is the basis of the notion of Efficient Cause, the species to which the popular conception most corresponds.

Temporal and spatial relations, however, demand more attention. Uniform succession and co-existence will not alone produce what is meant by 'cause' in ordinary thought; there must be added also the notion of 'enforcement' as Professor Pearson calls it, *i.e.*, that idea of force, power, &c., which we spoke of above. (a) But they are nevertheless important ingredients: "Contiguity in space of the objects causally related and priority in time of the cause before the effect are the only relations directly discernible," (b) and as regards 'unconditionality' the same writer remarks that it is part of the Causal relation and yet not the product of invariable repetition. "In its earliest form then, the so-called necessary connexion of Cause and Effect is perhaps nothing more than that of physical constraint. To this no doubt is added the strength of expectation as Hume supposed, when the same effect has been found invariably to follow the same cause. Finally when upon a basis of associated uniformities of sequence, a definite intellectual elaboration of such material ensues, the logical necessity of reason and consequent finds a place, and so far as deduction is applicable, cause and reason become interchangeable ideas." (c)

Mr. Hobhouse has set out clearly what assumptions are ordinarily made as to the relations in question, *viz.*, (1) that the logical antecedent of an event is also its antecedent in time, *i.e.*, that among the logical grounds of an event there is always one immediate temporal antecedent (the cause). Thus a fact may have any number of logical grounds or facts from which it can be inferred, but only one cause and (2) that antecedent and consequent must be in some close proximity in time and space which amounts really to this that cause and effect must be continuous with one another in space and time. It is true that we do often speak of a remote event as the cause, but the more accurately we think and observe, the more we fill up gaps in our sequences and re-

---

(a) Stout, *op. cit.*, Vol. I, p. 178.

(b) J. Ward, Article Psychology, *Encyclopædia Britannica*, 9th Edition, Vol. XX, p. 82.

(c) *Ibid.*, XX, p. 83.



duce them from a series of jumps to a continuous change. If we cannot detect an apparent change between the facts which we regard as cause and effect, we fill up the gap with a latent process of some sort, *e.g.*, a disturbance which arises here and has effect there, must in some way have propagated itself all across the distance.(a)

We cannot reproduce here all Mr. Hobhouse's argument, but must be content to say that his conclusion is that time and space, as such, make no difference to the conditions determining phenomena, but that given Y we must get X at whatever time or places Time itself is not a condition of the production of a fact. "In fact it is with causal as with all temporal succession the idea of one event B following an event A involves a good deal of (mainly involuntary) abstraction. No event ever begins or ends; but a process goes on which passes gradually from one phase into another. We ticket prominent or clearly distinct phases with separate names, and speak of them as different events; but we must remember that, though in one sense they are different, there yet is no barrier. Hence the law of the ground gives us a hint for our conception of a cause as that which not merely goes before the effect, but, as it continues, turns into the effect."(b) And again "Cause and effect . . . . are separate names implying separability in thought and observation, but not indicating that the contents thereby denoted are, in fact, parted by any interval of time or space. In view of this, the cause is sometimes held to be identical with the effect, but it would be better to speak of the effect as the continuation of the cause, to say, not the effect *is* the cause, but that the cause *becomes* the effect. They form in reality one process or stream of existence passing before us. Certain points in the stream stand out with well-marked characters, and such of these as immediately succeed one another get spoken of as cause and effect, the interval being regarded somewhat obscurely as a blank, or perhaps as a latent process. In fact these distinctions are in *ordine ad nos*. To the eye of the universe the stream is one and unbroken, and there is no more or less of importance where each section is the total condition of what

---

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 275, 276.

(b) *Ibid.*, pp. 277-8.

follows. Hence there is no more difficulty in speaking of causal connection as between the moments of a continued identity than in applying the same notion to a segment of a stream of change.”(a)

We fear that the reader who is unaccustomed to metaphysical thinking will not be able to follow this reasoning, but ‘cause’ is a metaphysical notion, and space and time, if considered apart from metaphysics, are apt to land the man of common sense in difficulties. That they have done so in the region of law, as elsewhere, will become apparent later, and it is only by the adoption of some such view as that quoted above that we shall be able to clear away and avoid what are really serious errors.

5. Before proceeding further, let us briefly recapitulate the results of our analysis. The popular idea of Cause is that of Efficient Cause : it includes the notions of force, constraint and change, and implies that one event is preceded by an antecedent event proximately related to it in time and space, and the connexion between the two events is unconditional. But though causation is a continuous process, it is a mistake to suppose that those particular events, which as most prominent or interesting to us in the chain, are marked off by us as cause and effect, are necessarily adjacent in time and space.

It is assumed, as stated above, that the expression ‘cause’ as employed in law and legal treatises is intended to correspond with the conception of the plain man, and we shall now go on to examine such applications of it as have come under our notice.

Sir James Fitzjames Stephen referring to his definition of ‘relevancy’ already quoted, added a proviso that the words ‘cause’ and ‘effect’ must be taken in their widest acceptation. To this it has been objected that, even so, the definition does not include all facts which we know from our experience to be really relevant ; and if the words are given a transcendent meaning based upon our knowledge that all things precedent have gone together to make up the state of things existing at any time and that no fact could ever have existed without the co-existence of every other fact that

Recapitulation of what is involved in the ordinary conception of cause.

Cause and Relevancy.

‘relevancy’ already quoted, added a proviso that the words ‘cause’ and ‘effect’ must be taken in their widest acceptation. To this it



did exist at the same time, then the definition includes everything and so ceases to be a definition. Thus the statement that relevancy means the connection of events as cause and effect requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense.<sup>(a)</sup>

Now it is no doubt true that the state of the universe at one moment may be regarded as the cause of its state at the next moment, but to seek for the cause on those lines is to pursue what is impossible. As Mr. Bradley puts it "It is only by a license that in the end both sides taken together can be abstracted from the universe. The cause is not the true cause unless it is the whole cause; and it is not the whole cause unless in it you include the environment, the entire mass of unspecified conditions in the background. Apart from this you have regularities, but you have not attained to intelligible necessity. But the entire mass of conditions is not merely inexhaustible, but also it is infinite; and thus a complete knowledge of causation is theoretically impossible."<sup>(b)</sup> What we do, therefore, is to seek out an effective and differential condition, and how we do it has already been explained: this is essential to progress, and its justification is simply its success and the impossibility of otherwise making any use of the causal conception. This is so well recognised that the objection quoted above, though we might expect it in a philosophical work, seems out of place in a legal treatise, and it certainly cannot be supposed that Sir James Stephen had any intention of understanding cause in this transcendent sense. At the same time the fact that such an objection has been raised and that Mr. Whitworth considered it necessary to propose alternative rules illustrates how needful it is to have a clear idea of what is intended by causation. If, as a fact, the causal connection, in the sense in which it is understood by the plain man, does not cover the whole meaning of relevancy, some addition must be made to the definition so as to include those relations which have been left out; this is practically what has been attempted in ss. 6-11 of the Indian Evidence Act. But to juggle with the meaning of 'cause' and to speak of using it in its widest acceptation without further explanation

---

(a) Ameer Ali and Woodroffe, Indian Evidence Act, pp. 81-2.

(b) Bradley, Appearance and Reality, p. 336.



as though every one must necessarily understand what that means, will simply end in chaos and give the pettifogging pleader just the opportunity that he desires.

Among facts apparently relevant but not really so are classed transactions similar to, but unconnected with, the facts in issue. These are inadmissible in evidence, but as an exception to the rule we find the following statement :—“ On the other hand and on the same principle, in cases where causation is well known and regular as in the case of physical and mechanical agencies, the conditions of mental disease, the propensities of animals and the like, evidence of similar but unconnected acts is often admissible.”(a) There are then quoted in the note, instances of horses being frightened by a pile of lumber, dogs killing sheep, sparks from engines igniting buildings, persons being considered insane because their ancestors were so, and allusions to the regularity of scientific instruments. It would hardly be possible to find a worse jumble of miscellaneous and dissimilar facts collected together under the head of causation.

In the first place we have the very confusion between causation and causal uniformity described by Dr. Ward (*vide supra*), for in mechanical agencies what is called causation is nothing more than invariable sequence. “ But if nature be taken in its mechanical aspect only,” says Mr. Underhill, “ as consisting of the primary qualities of matter, Hume’s Analysis is perfectly right. In this mechanical world causality, so far as natural science can know it, is mere succession : and the causality which Kant would attribute to nature is the efficient causality which we are conscious of in the actions of our own wills. . . . But with such causality mechanical science as such has nothing to do. . . . So long as we stick to quantities causality is merely the invariable sequence of consequence upon antecedent, nothing more nor less : for such sequence alone admits of mathematical determination in terms of number and quantity.”(b) There is regularity no doubt but not causation in the sense in which the plain man uses the term and the same may be said of the scientific instruments. As regards

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 136 and note 9.

(b) G. E. Underhill, *Use and Abuse of Final Causes*, *Mind* N. S., 50, p. 229.

the condition of mental disease it is not very plain how it is intended to be brought under any definition of causation, but from the illustration in the note it may be gathered that *A* would be inferred to be insane because he had shewn symptoms of insanity both before and after the time in question, and because his ancestors had been insane. That the previous—much less the subsequent—insanity caused the insanity in question seems an unnecessary way of putting the matter: either it was the same continuous insanity throughout, being a *latens processus* as Mr. Hobhouse calls it (*vide supra*) during the intervals of apparent sanity, in which case they are wrongly described as ‘similar but unconnected acts’ or else, if they really were not connected, it is an obvious error to speak of a causal relation which, whatever else it may do, at least posits a connection of some kind between the two events. Similarly with respect to the insanity of the ancestors: it is only by supposing that the insanity was continuous from them to *A*, being transmitted by inheritance, that we have any right to speak of cause and effect. Otherwise, if it is a mere argument from resemblance as the description ‘similar but unconnected’ suggests, then the inference would be no stronger because it was *A*’s ancestors who had been mad than because *B*, *C*, *D*, &c., persons totally unrelated to him, had displayed like symptoms. But in the latter case what would be the value of such evidence? It certainly would not prove any necessary connexion, though it might go—if supported by proof of other facts—to show some probability. As regards the disposition of animals we can only suppose that here again an argument is intended to be drawn from mere similarity, and as we treat of that fully elsewhere it is unnecessary to say more now except that we cannot understand why it has been included as an instance of ‘cases where causation is well known and regular.’ You cannot get causality out of mere resemblance, and that is the end of the matter: as Professor Stout says “In no other case (*i.e.*, except the law of similarity asserted by Bain) do we find that two distinct elements act upon each other merely because they resemble each other. Such a conception is unknown to science. We find a parallel to it only in the superstitions of magic, such as the belief that the melting of a

waxen image will produce the decline and death of the person it resembles.”(a)

6. We now pass on to s. 7 of the Evidence Act which says that ‘ facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.’ The learned Editors whom we have already quoted include all that they have to say under this head on causation in half a page : they describe these classes of facts as connected with the transaction in particular modes, *viz.*, occasion, cause, effect, opportunity, which modes are really aspects of causation.(b) We must dispute that the affording of an opportunity for an act can alone be called the cause of the act if we are to retain any clear meaning of cause ; otherwise there might be such a thing as a cause without an effect for every opportunity is not taken advantage of, in which case nothing will result. This indeed is really admitted in the Commentary where it is said “ There can be no crime without the opportunity ; but there is a wide gulf to be bridged over by evidence between opportunity and commission.” But what if that gulf is not bridged ? The opportunity was nevertheless given, and was, therefore, a cause : will it still be considered one ?

The truth is we want some distinction drawn between occasion, opportunity and cause, unless we are to regard the framers of the act as guilty of tautology, and the Commentators have not helped us to do it but have rather hindered by their suggestion that they are all aspects of one thing. If an aspect is simply a way of looking at things as we take it to be, a subjective matter, it strikes us as a particularly bad description of phenomena so objective in character as ‘ opportunity ’ and ‘ occasion ’ ; but in any case, an aspect of a thing must be the whole thing but looked at in a particular way, it is not merely part of it. But the occasion and opportunity, never are the whole cause, they are merely parts of it, and we must now explain what we mean by speaking of parts of a cause, for it is thus that we shall find the distinction

(a) Stout, *Anal. Psychology*, Vol. I, p. 275.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 135.



that we are seeking. The whole cause consists really of a sum of conditions all of which, as already explained, we cannot know : among these are some that strike us as contributing little to the effect and these we call the ' occasion,' ' opportunity,' ' condition ' and the like, but we reserve the name of ' cause ' for that condition which appears to be the most prominent and determining antecedent. Thus Prof. Sully says " a condition is any circumstance necessary to the production of a phenomenon. All the conditions of a phenomenon taken together constitute its cause. To condition is thus to have a part in causing or producing a result." (a) It is true that a cause may sometimes be called the occasion, in what sense is explained by Mr. Bradley. " Of course, even on these hypotheses, one link of a series will be a cause of what follows, if you take that link in connection with the rest of the universe. Hence with regard to ' occasionalism ' we may say that since every cause must be limited more or less artificially every cause, therefore, is able to be called an ' occasion.' You may take in further and further conditions until your partial cause seems an item unimportant, and even therefore, ineffective. And here we are on the confines of absolute error. If the ' occasion ' is divided from the whole entire cause, and so held to be without an influence on the effect that is at once quite indefensible." (b)

But just as in the case of ' condition ' which cannot be taken to be equivalent to the condition *sine qua non* as Mr. Hobhouse insists, *i.e.*, the antecedent without which the consequent cannot be, so also with ' occasion ' and ' opportunity ' : they cannot be regarded as anything more than factors in the total result, and neither of them can be taken to be the most important one. (c)

7. It is provided in s. 27 of the Indian Evidence Act that

<p>Other instances of use of Cause in the Evidence Act.</p>	<p>" when any fact is discovered in consequence of information received from a person accused of any offence in the custody of a Police-officer so much of such information whether it amounts to a confession</p>
---	--

(a) Sully, Outlines of Psychology, p. 5, note.

(b) Bradley, Appearance and Reality, p. 326, note 1.

c) Hobhouse, Theory of Knowledge, p. 349.

or not as relates distinctly to the fact thereby discovered, may be proved.” One would have thought that this section was sufficiently clearly worded to be intelligible enough to the ordinary man but unnecessary recourse to irrelevant precedents combined with a failure to understand clearly what causality is on the part of our judges, has led to the importation of a vast amount of confusion and error into the criminal law.(a)

In the first place it is said “ In regard to the extent of the words ‘ thereby discovered ’ we may derive some assistance from the test applied by the Courts in dealing with proximate and remote causes of damage, namely, whether what followed was the natural and reasonable result of the defendant’s act.”(b) As we shall have occasion shortly to examine fully the notions of ‘ proximate ’ and ‘ remote ’ causes, we will here merely refer the reader to what has been already said on temporal and spatial relations in causation, and remind him of our conclusion that ‘ cause ’ as it should be understood does not imply that the events in question must necessarily have proximity in time or space : as regards the citing of the doctrine of ‘ natural and probable consequences,’ which seems to us to be purely gratuitous, we have so many objections to this that we must similarly defer the statement of them until later on in this chapter. We cannot, however, refrain from remarking here, that though the doctrine is intelligible to us when used for the purpose of deciding whether a man should be held civilly liable for certain consequences flowing from his act, we cannot see how it can in any way be employed as a test for determining whether as a matter of fact such a consequence did follow from such an antecedent.

The same paragraph proceeds as follows :—“ It was formerly held by the Bombay and Allahabad High Courts(c) that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered ‘ in consequence

---

(a) See Ameer Ali and Woodroffe, *op. cit.*, pp. 270-274.

(b) *Q.-E. v. Nana*, I. L. R., 14 Bom., 260, 267 (1889), per Jardine, J.

(c) *Empress of India v. Pancham*, I. L. R., 4 All., 189, 204 (1882); *Q.-E. v. Babu Lall*, I. L. R., 6 All., 509, 544 (1884), per Straight, J. : *Q.-E. v. Kamalia*, I. L. R., 10 Bom., 595, 597 (1886).

of the information.' It was said that in such a case the article is discovered by the *act of the party* (the italics are not ours but the Editors) and not in consequence of the information." We have said above that in ordinary life we choose out the most important and striking antecedent from among the totality of conditions and term it the cause, but we have never heard before of choosing out the most unimportant condition and ticketing it as the cause for the express purpose of excluding what was the more determining factor in the case : this, however, is clearly what was done by these learned judges. We can only account for such perversity by supposing that here again we have an instance of the view that that phenomenon can only be regarded as the cause which is immediately adjacent in time to the event to be accounted for. The reader perhaps will not be surprised to hear that the decision was subsequently dissented from in the case of *Q.-E. v. Nana* already referred to, as well as by the Calcutta High Court,<sup>(a)</sup> but the reasons given for such dissent still betray an adherence to the same fallacy : " It was held that the statement of the accused that he had buried the property in the fields was admissible under this section, as it set the *police in motion* and led to the discovery of the property, and that a statement is equally admissible whether it is made in such detail as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed." It was thus only by the vulgar expedient of positing a *latens processus*, as Mr. Hobhouse called it, in the shape of a ' setting the police in motion,' &c., that the court could satisfy itself that there really was a causal connection between the information and the discovery.

We next find it laid down by the Commentators with reference to the question ' how much of such information must be proved,' that " the discovery proves not that the whole, but some portion of the information given is true, namely, so much of the information as *led directly and immediately to*, or was the *proximate cause of* the discovery :"(b) this is interesting because it

---

(a) I. L. R., 25 Cal., 413 (1897).

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 273.



appears that the two phrases italicised by the Editors are regarded by them as identical in meaning, a point which will be referred to again hereafter. At all events, if it is not so, an explanation of the difference might have been expected, and similarly with regard to the expressions 'directly' and 'immediately.' This view is enforced by a quotation of the words of West, J. : "It is not all statements connected with the production or finding of property which are admissible; those only which lead *immediately* to the discovery of property, and so far as they do lead to such discovery are properly admissible . . . other statements connected with the one thus made evidence, and so *mediately*, but not necessarily or directly, connected with the fact discovered are not to be admitted, &c.(a) Similar stress is laid on the 'proximacy' and 'immediacy' of the cause by the Madras High Court(b) and this we understand from their text is the view adopted and espoused by the Editors.

Now why all these persons should follow one another in reading the words 'proximate' and 'immediate' into s. 27 of the Act where there is nothing corresponding to them, we cannot for the life of us imagine; and it is the more astonishing because s. 7, which is the section that explicitly treats of causation, appears to say just the opposite, the words there being "Facts which are the occasion, cause or effect, immediate *or otherwise*, of relevant facts, &c., . . . are relevant." That they should thus go out of their way to make one section of the Act inconsistent in principle with another can only be attributed to confusion on the subject of Causality. It may be noted, however, that this unwarranted restriction of s. 27 was not always made for, to quote the words of the Commentators "the relevancy of mediate connection appears to be the *ratio decidendi* of the case of the *Queen v. Pagaree Shaha*, 19 W. R. Cr., 51 (1873), in which a wider construction was put on the words 'as relates distinctly,' so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact, but also the portion which leads *mediately* by way of explanation" though they go on triumphantly to

---

(a) *Reg. v. Jora Hasji*, 11 Bom. H. C. R., 242, 244, 245 (1874).

(b) *I. L. R.*, 12 Mad., 153 (1888).

assert that this decision was overruled by *Adu Shikdur v. Q.-E.*(a) The notion that 'mediateness' is fatal to 'distinct relation' or 'consequence' is indeed whimsical to those who hold that all inference involves a middle term at all events on analysis, if it be not always consciously used.

8. It is time now to take up the promised examination of the doctrines of 'proximate' and 'immediate' cause and of 'necessary and probable consequences.' They are closely related and the best statement of them is probably that of Sir Frederick Pollock. "Liability must be founded on an act which is the 'immediate cause' of harm or of injury to a right. Again there may have been an undoubted wrong, but it may be doubted how much of the harm that ensues is related to the wrongful act as its 'immediate cause' and therefore is to be counted in estimating the wrongdoer's liability. The distinction of proximate from remote consequences is needful first to ascertain whether there is any liability at all, and then, if it is established that wrong has been committed, to settle the footing on which compensation for the wrong is to be awarded." (b) And again, "the meaning of the term 'immediate cause' is not capable of perfect or general definition. Even if it had an ascertainable logical meaning, which is more than doubtful, it would not follow that the legal meaning is the same. In fact our maxim only points out that some consequences are held too remote to be counted. What is the test of remoteness we still have to enquire. The view which I shall endeavour to justify is that, for the purposes of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate' or, to anticipate a little, 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 273, note 2.

(b) Pollock on Torts, 6th Edition, p. 29; cf. also Best on Evidence, § 38.



forthcoming, whether or not the consequence was 'immediate' does not matter. That which a man actually foresees is to him, at all events, natural and probable." (a)

Supplementary to this is the maxim that "a man is presumed to intend the natural consequences of his acts," or, in the terms of a judicial statement "a party must be considered, in point of law, to intend that which is the necessary and natural consequence of that which he does." (b)

The above is a fair description of the doctrine and it will conduce to clearness if we examine it in parts beginning with the conception 'proximate' and 'immediate' cause. In the first place it is not hopeful when we are told that the 'immediate cause' cannot be defined: we should rather have expected otherwise, for 'immediate' is a term which has reference purely to the temporal relation, and likewise the expression 'proximate' seems capable of adequate definition in mere terms of time and space. Or to put it otherwise, it would not have been surprising if we had been simply told that they were ultimate terms that needed no definition, but carried their meaning on their face. Reverting to our description of 'cause' as that condition out of the sum of conditions which we pick out as the most important one we do not see why Sir F. Pollock should not select that antecedent condition which is most contiguous in time to the consequent, and say that that under all circumstances should be regarded as the 'immediate cause' and likewise that condition which is most contiguous in both time and space should be regarded as the 'proximate cause.' So far as we can see this would have given to each phrase a clear meaning: at the same time it is plain that it would not have suited the doctrine in question which requires 'immediate' to be sometimes equivalent to 'natural and probable.' "There is a point where subsequent events are, according to common understanding, the consequence not of the first wrongful act, but of something else that has happened in the meanwhile, though but for the first act, the event might or could not have been what it was. But that point cannot be defined by science or philosophy; and even if it could, the definition would not be

(a) Pollock on Torts, pp. 30-31.

(b) Pollock on Torts, p. 33.



of much use for the guidance of juries.”(a) Likewise Quain, J., is quoted (*Sneesby v. L. & Y. Railway Co.* (1874), L. R., 9 Q. B., p. 268): “In tort the defendant is liable for all the consequences of his illegal act, where they are not so remote as to have no direct connection with the act, as by the lapse of time for instance.”

Now we are tempted to say to both these champions you must make up your minds whether you will hold, as we do, that cause and effect are not necessarily contiguous in time and space, *i.e.*, as ‘cause’ is ordinarily used by the plain man or whether you will maintain the contrary, but there is no room for hedging. If you take our view you must throw over your terms ‘immediate,’ and ‘proximate’ and indeed you must in any case, if you wish to be consistent, for at present you are trying to force into them two contradictory conceptions, that is to say, if you attach any meaning to the words ‘immediate’ and ‘proximate’ which an Englishman can understand.

That there was some difficulty about the application of these phrases is clear from the suggestion of Brett, M. R., that he would prefer ‘real’ to ‘proximate’ and the statement of Fry, L. J., “I will not attempt to give any paraphrase of the word ‘proximate.’ The doctrine of causation involves much difficulty in philosophy as in law; and I do not feel sure that the term ‘real’ is any more free from difficulty than the term ‘proximate.’”(b) In another case ‘proximate cause’ was said to mean ‘direct and immediate’ cause,(c) an identification already noted by us. ‘Real,’ however, has this advantage over ‘proximate’ that it does not raise the time difficulty, and the same may be said for ‘decisive’ which Sir F. Pollock favours, though not it seems to the entire exclusion of the notion of proximity. “This leaves no doubt,” he says, “that the true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief: and negligence on the plaintiff’s part which is only part of the inducing causes, will not disable

(a) Pollock on Torts, 6th Edition, p. 35 and note (x).

(b) *Seton Laing & Co. v. Lafone*, L. R., 19 Q. B. D., 68, 71, 74.

(c) *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. D., 776, 780.

him. I say 'the proximate cause' considering the term as now established by usage and authority. But I would still suggest, as I did in the first edition, that 'decisive' might convey the meaning more exactly. For if the defendant's original negligence was so far remote from the plaintiff's damage as not to be part at least of its 'proximate cause' within the more general meaning of the term, the plaintiff would not have any case at all, and the question of contributory negligence could not arise. We shall immediately see, moreover, that independent negligent acts of *A* and *B* may both be proximate in respect of harm suffered by *Z*, though either of them if committed by *Z* himself would have prevented him from having any remedy for the other. Thus it appears that the term 'proximate' is not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's. The plaintiff's negligence, if it is to disable him, has to be somehow more proximate than the defendant's. It seems dangerously ambiguous to use 'proximate' in a special emphatic sense without further or otherwise marking the difference. If we said 'decisive' we should at any rate avoid this danger." (a) We have not quoted this passage because we think it lucid: in fact we are somewhat mystified by phrases such as 'part of the inducing causes,' "part at least of its 'proximate cause' within the more general meaning of that term," 'both be proximate,' 'somehow more proximate,' but because we think it amounts very much to a confession of the break down of this part of the doctrine, or if it is not, that it will hardly survive such a mixing of terms.

9. We have now to consider the second part of the doctrine, that is to say, the theory of 'natural and probable consequences.' If the reader will refer back a few pages he will see that these are such as 'a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to see as likely to follow upon such conduct.' Another passage may here be cited: "For although we do not care whether the man intended the particular consequence or not, we



have in mind such consequences as he might have intended, or without exactly intending them, contemplated as possible; so that it would not be absurd to infer as a fact that he either did mean them to ensue, or recklessly put aside the risk of some such consequences ensuing. This is the limit introduced by such terms as 'natural,' or more fully 'natural and probable' consequences. What is natural and probable in this sense is commonly, but not always, obvious. There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence could have foreseen. Between these extremes is a middle region of various probabilities divided by an ideal boundary which will be differently fixed by different opinions; and as we approach this boundary the difficulties increase." (a) The concluding passage may be carefully noted as it supports the view for which we have elsewhere contended that the test proposed is an impossible one. We shall now refer the reader to our chapter on the 'Theory of the Normal Man' in which will be found the reasons adduced for the following conclusions: that the person of average competence and knowledge has no existence, and such a notion is impossible of application to particular cases; in fact this sham standard is merely ignored and the juryman puts himself in the place of it; finally, if it could be applied, it would have to be so frequently varied and altered that the claim to have in it a universal and general rule would be a mere farce.

All that we have to say in addition here is that it is a one-sided arrangement if it is open to one side to prove that the doer actually did foresee, &c., thereby discarding, when it suits him, the standard of the man of average competence and knowledge, while it is not open to the wrong-doer to show that he is not a person of average competence and therefore such and such consequences were not intended by him or probable to him: he must in every case abide by that standard. (b) And again 'proximate' and 'immediate' consequences (which are held to be the same as 'natural and probable') express objective relations among ex-

---

(a) Pollock on Torts, pp. 34-35.

(b) *Ibid.*, pp. 31, 35.



ternal phenomena in the sense in which these words are elsewhere used by these writers and it is difficult, therefore, to grasp how they can be said to depend on any individual's point of view, much less that of a standard man who has no personal existence.

We will conclude this section by briefly examining some of the cases given by Sir F. Pollock as illustrations of the rule of 'natural and probable consequences': as it would occupy too much space to summarise the facts of each case here the reader must refer for details to the treatise in question.(a)

The first case is that of *Vandenburgh v. Truax*, and what (as we understand the summary) the defendant was held liable for was the loss of certain wine. To say that this was a natural and probable consequence of his action strikes us as simply fiction, and the learned author does not go further than to assert that it was natural that the tenant should 'do some damage' to the plaintiff's property. It seems to us that the decision was really capricious, the defendant being made responsible for all that followed his first act, merely because he was the original wrongdoer without any reference to whether the consequences were natural and probable or not.

The same applies to the second case of *Guille v. Swan* and to judge from the remarks concerning them in the treatise,(b) the defendant in each case was held liable (1) because he was a wrongdoer and (2) because his original act was a voluntary one, *i.e.*, so far as any principle was followed. That this is so, seems further shown by the fact that if the next case, that of *Glover v. L. & S. W. R. Co.* be compared with the first case, there can be little doubt we should imagine that the consequences in question were at least as probable as in the case of *Vandenburgh v. Truax*, yet nevertheless, it was decided in the defendant's favour. Equally may this be said of the case of *Cox v. Burbidge* as compared with the first case and of *Lee v. Riley*(c) when compared with *Cox v. Burbidge*; for to say that it is not a probable result that if a horse strays into a road it will kick a man, while it is probable that if it

---

(a) Pollock on Torts, pp. 36, *et seq.*

(b) *Ibid.*, p. 38.

(c) *Ibid.*, p. 44.

strays into a field it will kick another horse, is very much like the distinction between a lottery and a raffle.

In the case of *Hill v. New River Company*(a) what was held to be the 'proximate cause' was clearly not the condition that was nearest in point of time or space, though it might have rightly been termed the 'decisive cause' or the fact that was primarily responsible for the accident.

The case of *Clark v. Chambers*(b) strongly suggests that the rule of probable consequences was never considered at all, but what decided the matter was the active wrong-doing of the defendant. This is admitted by Sir F. Pollock, though he also makes, as it seems to us, a quite unsuccessful attempt to reconcile the decision with the doctrine.

Finally the decision in *Victorian Railways Commissioner v. Coultas*(c) is clearly inconsistent with the rule, for there was nothing whatever improbable in the injuries resulting to the woman from mere fear, under the circumstances of the case. That the consequences were decided to be too remote must, as we think, have been due to other grounds: nor does it seem to us practicable to make the consequences depend on the standard of a person of ordinary courage and temper; it is certainly not improbable that the person run over would be of less than the average courage, and why in that case should his claim to compensation rest on a mere law of averages?

10. The treatment of Homicide by Sir J. F. Stephen in articles 219-221 of his *Digest of Criminal Law* appears to afford an illustration of the confusion which results from an unsatisfactory view of causation. He starts in article 219 with an explanation of the Causal connection which is of a contradictory character and to which he is unable to adhere: indeed the next article not merely abandons it but flatly contradicts it, although an attempt is made to save appearances by asserting that the definition in article 219 is subject to the provisions con-

Examination of  
Sir J. F. Stephen's  
treatment of Causa-  
tion with reference  
to homicide.

---

(a) Pollock on Torts, p. 41.

(b) *Ibid.*, pp. 47-49.

(c) *Ibid.*, pp. 50-51.

tained in the next two articles. Further, he does not always, as it seems to us, in fact apply the tests of causation which he professes to have adopted, and the conclusions are in more than one instance at variance with what we conceive the views of the plain man would be on the subject.

Homicide is the killing of a human being and killing is defined in article 219 as follows :—“ Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(Submitted.) But the conduct of one person is not deemed for the purposes of this article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This article is subject to the provisions contained in the next two articles.

#### *Illustrations.*

(1) \*                      \*                      \*                      \*                      \*

(2) \*                      \*                      \*                      \*                      \*

(3) *A*, an iron-founder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills *B*. *A* has killed *B*.

(4) *A*, *B* and *C*, road-trustees under an Act of Parliament and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and *D* passing along it is killed. *A*, *B* and *C* have not killed *D*.

(5) \*                      \*                      \*                      \*                      \*

(6) *A* tells *B* facts about *C* in the hope that the knowledge of those facts will induce *B* to murder *C*, and in order that *C* may be murdered ; but *A* does not advise *B* to murder *C* ; *B* murders



*C* accordingly. *A* has not caused *C*'s death within the meaning of this article."

We call this suggested criterion of causation self-contradictory because it requires that the act should be directly and immediately connected with the death, and then goes on to speak of degrees of directness and immediacy: if however these terms are to retain any distinctive meaning, and are not to become equivalent to such notions as 'natural and probable' as they do in the way they are used, *e.g.*, by Sir Frederick Pollock(*a*) you must employ them with reference to what is strictly adjacent in time and space. The fact is, as we have pointed out, that immediate sequence in time cannot be made the test of Cause and Effect, and we have before us only another instance of the break-down of such an attempt, as will soon become abundantly plain.

If illustrations (3) and (4) quoted above are compared, the ground we suppose on which it is held that homicide was committed in one case but not in the other, is merely that the interval between antecedent and consequent was considered to be greater in the latter case than in the former one. This is an example of making it a question of degree dependent upon the circumstances of each particular case: but if you eliminate from illustration (3) whatever is attempted to be implied by the use of the word 'dangerous,' it seems to us that the cases are precisely on the same level and should not have been distinguished, and we believe that this would be the view of the ordinary man. If the importation of 'dangerous' into the case is intended to make any difference to the illustration, then clearly some other test of causation is being tacitly introduced, the nature of which is not evident.

The second part of the article is necessitated by the tendency to confuse the notions of Final and Efficient Cause previously alluded to. The difference between 'motive' and 'cause' has been sufficiently discussed in a former chapter(*b*) where it is pointed out that you cannot preserve a clear meaning for the causal

His criterion of  
Causation self-contradictory.

His confusion of  
'Cause' and 'Motive.'

(a) See p. 287, *et seq.*, *supra*.

(b) Chapter IV, para. 8.

conception if you include ' motive ' under it. This is to some extent recognised here, for the words " and not so as to make the first person an accessory before the fact to the act of the other " really introduce the idea of efficient cause : the man becomes an accessory before the fact, it would seem, only if he does something to encourage the commission of the crime actively (See Article 39), and this notion of ' activity ' is what is implied in Efficient Cause, and carries with it the idea of force, power, &c. When, however, we come to the illustrations designed to show the point at which it can be said that the man has caused the death or not by his advice, &c., it amounts simply to this, that unless he says to *B* in actual words ' murder *C* ' or the equivalent of this, he has not caused the death of *C*. This we think is a fair deduction from illustration (6) quoted above, and the instances taken from *Othello* and *Oliver Twist* given in the note, (a) but it can hardly be said to be a successful definition of cause which makes it practically depend on the verbal formula used. The effect of words which are not an express direction may be just as certain and as certainly traced sometimes as the result of a positive command to commit homicide : the plain man sees no difference between such cases and classes them both as the cause, or refuses to call either the cause of death, because he is not hampered by the idea of directness and immediacy of connection and does not seek to discover this by an examination of the actual expression employed. That notion is really borrowed from the physical world, and you cannot successfully employ it outside the physical act from which the death results ; it is a mistake on the part of our lawyers to try and include under it the result of one individual's words on another as though you were dealing with two mere mechanical forces that act and re-act on one another by impact.

That the legal conception of cause adopted is inadequate to do its work becomes apparent when we come to Article 220. It is here laid down that a man commits homicide, although his act is not the immediate or not the sole cause of death, in five cases, to one of which attention will be drawn separately later. This is nothing more or less than an abandonment of the test of im-

---

(a) Digest of the Criminal Law, 3rd Edition, Art. 219, note 7.

mediateness and the inclusion—if a thing may be said to be included in something else which it absolutely contradicts—of remoteness of connection in the legal conception of Cause : it further involves the recognition of plurality of causes which is equally contradictory of the main law, and the discussion of which we have purposely avoided in this chapter as unnecessary on the view of causation put forward by us.

We may remark that Sir J. F. Stephen's definition of Cause having once capitulated and let in five exceptions in Article 220, there seems no reason why its defeats should not extend to twenty or more in number if any one of moderate ingenuity were concerned to combat it further. We shall however confine ourselves here to noticing one of the five exceptions and its illustration : it is homicide “ (c) If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured.

#### *Illustration.*

(4) *A* violently beats and kicks *B*, his wife, on the edge of a pond. She to avoid his violence, throws herself into the pond and is drowned. *A* has killed *B*.”

To this a note is annexed that if the intention was to escape further ill-usage by suicide, the case would be altered. But if so, *A* is made the cause of *B*'s death not according to the degree of the connection between his act and the resulting death of *B*, nor yet even according as his own intention was to kill her or not, but according to what was *B*'s intention in the action she took consequent on *A*'s ill-usage. Further in order to judge of this it has to be considered whether the action which *B* took was one which under the circumstances would appear natural to the person injured, which is the old doctrine of natural and probable consequences against which we have elsewhere protested. It thus comes to pass that *A* has caused *B*'s death or not simply “ according to the point of view which happens to be taken by the external

His introduction  
of the question of  
intention into Causa-  
tion.



observer,"(a) and it appears to us that, if a number of educated persons were asked to say whether homicide had been committed or not in each of the two cases quoted [*i.e.*, illustration (6) to Article 219 and illustration (4) to Article 220], they would class the former one as homicide but not the latter, arriving in each case at a contrary conclusion to that of the author of the Digest.

In Article 221 we come to three cases in which a person is deemed not to have committed homicide although his conduct may have caused death :

- “(a) when the death takes place more than a year and a day after the injury causing it . . . . .
- (b) (It is said) when the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death though no one of them by itself would have caused death ;
- (c) (It seems) when the death is caused by false testimony given in a Court of Justice.”

*Illustrations.*

- (1) *A* by a long series of acts of ill-treatment none of which by itself would cause death, causes the death of *B*. *A* has killed *B*.
- (2) *A* and *B* in order to get a reward offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against *C*, whereby *C* is convicted and executed. *A* and *B* do not kill *C*.

The first case is remarkable because it implies that the effect may follow the cause after a longer interval than one year, and in view of this possibility it has to be specially laid down that such a case of causation is not homicide. If, however, the test of ‘immediate and direct connection’ were really worth anything and could be adhered to, it would be unnecessary to lay down anything of this kind, because such a case would be excluded by the

---

(a) See p. 274, *supra*.

mere terms of the definition of cause adopted in Article 219. At all events, so far as immediateness is concerned, such a case would have no chance, and if any separate claim were made for it on the score of 'directness' we might well ask the claimant how he proposes to define 'directness' without the aid of 'immediateness.'

As regards the second case it is remarked in the note accompanying it(a) that Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences," a conclusion which our author does not accept. He instances the cases of a man being intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him: of a sick person being intentionally awakened by a loud noise when sleep gives him a chance of life: of a man known to have an aneurism of the heart being startled by his heir rushing into the room and roaring in his ear 'your wife is dead,' the intention of the heir being to kill him. All these cases he considers would be murder, but as regards a prosecution for breaking the hearts of fathers or wives by bad conduct he replies that such an event could never be proved. A long course of conduct gradually breaking a man's heart could never be the "direct or immediate" cause of death.

It appears to us that there is a tendency here to confuse the question of intention with the question of causation, and that the actual causing of death is in reality inferred from the assumed intention to cause it. In the first instance if it were not clear that the man was intentionally killed by being kept awake we doubt whether any one would say that the man who kept him awake, caused his death, and likewise in the other two instances. These cases are on the same level with cases of breaking a person's heart by a long course of conduct, because the difficulty is the same in each, *viz.*, that you cannot pick out that one prominent and determining antecedent from among the sum of condition which contributes most to the effect.(b) The effect, *viz.*, death, is not caused by the single act of waking up, shouting out, keeping awake, &c., that merely contributes something to it and unless you import

---

(a) Article 221, note 5. (b) See p. 283, *supra*.

into the act an intention to kill, it does not even appear to be justifiable to regard this alone as the cause.

In the third case it is again assumed that death was caused by something that was not directly and immediately connected with it, *viz.*, the false testimony. So far therefore as causation goes you may have it without directness and immediateness of connection : why then is this not a case of homicide ? For ourselves we really cannot say, and we think that the plain man would certainly regard it as such. If it be argued that the intention of *A* and *B* was merely to get a reward and not to bring about *C*'s death then we should like to ask why the same test should not be used in the case of the husband who beat his wife in consequence of which she threw herself into the pond [see illustration (4) to Article 220] ? It is not suggested there that he had any intention to kill her and surely it was at least as probable that the death of *C* would result from a false charge involving a capital penalty, as it was that the death of *B* by drowning would follow on the violent beating given by *A*, and the connection is not really more direct in the latter than in the former case.

The fact is that by sometimes regarding cause and effect as requiring immediate connection and sometimes allowing remote connection and sometimes looking also to the intention of the agent in the case when deciding the mere question of causation, our author plays fast and loose with Causality, and so we get results that contradict one another and offend the plain man's sense of what is right.



## CHAPTER IX.

### BELIEF, DOUBT, TESTS OF TRUTH, REALITY.

Belief described—Belief distinguished from knowledge—Proof—Belief based on Experience—The inexperienced Judge necessarily sceptical—Doubt described—Doubt and Disbelief distinguished—What is reasonable Doubt—Irrational Doubt—The ring of Truth—Perversity of appellate courts—Belief and Feeling—Belief and Action—Belief and Desire—The intellectual element in Belief—Imagination and Belief—Truth—Impossibility—Probability—Frequency—Reasonable Doubt again considered—Demonstration and Proof distinguished—European and Native Evidence—Oaths—Affirmative and Negative evidence—Untrue Confessions—Criticism of Sir James Stephen's views on Truth, Belief and Reasonable Doubt.

**Belief described as popularly understood.** BELIEF, it would seem, cannot be defined. "It may be described," writes the late Professor Adamson, "or marked off from similar or contrasted states, but a rigidly scientific definition of what appears to be a simple ultimate fact is not attainable." (a) In popular language, he says, it is taken to mean the acceptance of something as true which is not known to be true, the mental attitude being a conviction that this is not so strong as certainty, but stronger than mere opinion; the ground of such conviction is probable as opposed to intuitive or demonstrative evidence.

**Belief and Knowledge.** He distinguishes Belief from Knowledge as follows:—We know states of consciousness when they are immediately present, together with their differences, similarities, connections and relations to self, also what is necessarily connected with present experience and can be logically deduced from it, and all propositions of apodeictic certainty such as those of mathematics and logic. The field of belief is sensible cognition, memory, testimony, *i.e.*, we accept as true facts not in our own experience and expectation. Many objects of belief are also objects of knowledge, but not all; and he expresses

---

(a) R. Adamson, *Art. Belief, Encycl. Brit.*, 9th Edn., Vol. III, p. 532.

the subjective side of belief by saying that, belief is the thinking of reality which is determined by grounds not necessarily valid for all intelligence, but satisfactory for the individual thinker.(a)

The above, it is believed, is an accurate account of the popular conception of Belief, and also in the main of the Psychological use of the term. The law apparently distinguishes two kinds of belief, both based on inference, but only treating that as a real inference which is as to matters not directly perceived by the senses. Those matters directly perceived by the senses it terms "facts" and admits the witness's statements concerning them as evidence, not requiring him necessarily to speak with certainty about them but allowing him to say that he 'believes' or 'is of opinion' that he saw A, &c.; but 'belief' in the other sense of inference from what is not directly perceived may not be stated in evidence except in a few cases which are mostly included under the head of 'opinion of experts.'(b)

This distinction between matter of fact and matter of opinion will be found treated of elsewhere under the head of 'inference.'

2. It will be well perhaps to start by ascertaining what is meant by 'proof' in law. The following is the definition given in s. 3 of the Indian Evidence

**Proof.** Act:—"A fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." Proof then is concerned with Belief and also with what is probable.

"The word proof," says Best, "seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also . . . . 'Proof' is also applied to the conviction generated in the mind by proof properly so called,"(c) and with respect to conviction he says "the

(a) R. Adamson, p. 533.

(b) E. Robertson, *Art. Evidence*, *Encycl. Brit.*, 9th Edn., Vol. VIII, p. 741.

(c) Best on Evidence, § 10.

persuasion of guilt ought to amount to a moral certainty” “such a moral certainty as convinces the mind of the tribunal, as reasonable men, beyond all reasonable doubt.”(a) This will be sufficient for the present, and we shall now proceed to show what it is that creates belief or conviction and in what doubt consists, and further what is the nature of probability.

“ It is commonly admitted that the great source of all definite  
Experience, Belief,  
and Reality. connective belief is experience and association. Reality is given us in our common-sense-experience as a tissue of connected parts, *e.g.*, qualities conjoined in things, a succession of connected changes in things. These connections in our presentative experience determine by the process of association the order of our representations. We may say then that all belief tends to take on the form of an apprehension of an objective connection or relation, which relation is suggested by a process of reproduction. As pointed out above the process of contiguous association is that by which the order of our ideas is assimilated to that of our perceptual experience. Hence contiguity is the main intellectual factor in belief. To realize an idea by setting it in definite relations of space and time is only possible through the workings of contiguous associations.”(b)

We believe then what we can connect with and what fits in with our own experience, and as the strength of association varies with the amount of repetition and with the degree of uniformity of the connection, recurring and invariable conjunctions produce stable thought connections. The point that we wish to emphasize is that we must seek the criterion of Reality within and not without our consciousness. “ It can be nothing else,” says Höfding, “ than the inner harmony and consistency of all thoughts and experiences.....it is only the single and immediate phenomena of our own consciousness of which we have a direct and immediate certainty. As soon as we have to do with complex phenomena,

---

(a) Best on Evidence, § 95.

(b) Sully, Outlines of Psychology, p. 302.



the only possible criterion of Reality is in the firm causal connection.”(a)

We desire to illustrate further in what sense we mean that Belief depends on ourselves and not on the objective character of facts outside us. and this seems to be well done by Dr. J. Ward in the following words :—“ Emotion and desire are frequent indirect *causes* of subjective certainty, in so far as they determine the constituents and the grouping of the field of consciousness at the moment—‘ pack the jury ’ or ‘ suborn the witnesses ’ as it were. But the *ground* of certainty is in all cases some quality or some relation of these representations *inter se*. In a sense therefore the ground of all certainty is objective—in the sense that is of being something at least directly and immediately determined for the subject and not by it. But though objective this ground is not itself—at least is not ultimately—an object of presentation.....it depends upon the effect of the proposition on the subject judging,” and then he continues later “ the consistency we find it possible to establish among certain of our ideas becomes an ideal, to which we expect to find all our experience conform.”(b) And again, “ the reality of a presentation turns not upon what these elements are regarded as qualities or relations presented or represented, but upon whatever it is that distinguishes the presentation from the representation of any given qualities or relations. Now this turns partly upon the relation of such complex presentation to the subject whose presentation it is.....Reality or Actuality is not strictly an item by itself, but a characteristic of all the items that follow, *i.e.*, impenetrability, unity and complexity, temporal continuity, substantiality.”(c) What is to us real, true, probable, &c., and therefore that in which we believe is in the last resort what accords with our experience, and this no doubt is what Mr. Bradley implies when he asserts consistency to be the standard of reality and experience to be the same as Reality(d), and says that the real is what satisfies.(e)

---

(a) Höffding, *Outlines of Psychology*, p. 219.

(b) J. Ward, *Art. Psychology Encycl. Brit.*, 9th Edn., Vol. XX, p. 83.

(c) *Ibid.*, pp. 55-56.

(d) F. H. Bradley, *Appearance and Reality*, pp. 139, 144.

(e) *Mind* N. S. 49, p. 57, Note 1.

This will become still clearer when we analyse doubt : at present it must be pointed out as the result of this view that it is now apparent why different Magistrates and Judges hold such conflicting opinions as to the truth of evidence. We believe that to be true which accords with our experience, and the Barrister Judge, *e.g.*, who comes out from England and has had no experience of the people, of whose language and thoughts he is altogether ignorant, has no experience with which the evidence he reads or takes can possibly accord. If he applies his experience of the European at home, as he may try to do, he finds that little accords with it and is disposed to reject as untrue or improbable much that comes before him, while if, on the other hand, recognising the danger of such a course, he attempts to do entirely without the aid of experience as the test of reality, he must necessarily have recourse to the rules and maxims of legal text-books, by a too close adherence to which he rapidly becomes simply the exponent of the letter of the law to the disregard of the more important facts. It is not surprising therefore if he acquires the reputation of being both sceptical and a lover of technicalities.

But further than this, a man placed in so false a position must naturally be timid, and to be suspicious is part of the general temper of timidity : this therefore also contributes to the same result. For suspicion expresses the influence of fear on belief, it is a state in which trifling incidents are read as the certain index of great matters and more especially it points to exaggerated estimates of the motives and intentions of others.(a)

We are aware that it is claimed for this type of judge that his greater legal training enables him to weigh evidence more successfully than the judge who has spent more of his time among the people and less in the law Courts, but such a claim is merely due to ignorance of what weighing evidence means. "If one point of similarity or difference," says Mr. Hobhouse, with reference to a remark that points of resemblance must not be counted but weighed, "is taken as intrinsically of greater weight than another, this can only be on some ground of experience of its beha-

---

(a) Bain, *Mental and Moral Science*, p. 236.



viour,"(a) and so also when evidence is weighed the reason why more importance is attached to one witness's statement than another's is that the experience of the judge leads him to hold that it is more likely to be true. It is by experience that you weigh testimony not by the rules of writers on evidence and therefore the man who has the greater experience—by which we mean experience of the people, not of the law Courts—will have the advantage here.

It is the experience of human nature not of books that enables us to judge, as the late Professor Tyndall says when speaking of Mr. Mozeley's defence of miracles: "He accepts these miracles on testimony, why does he believe that testimony? How does he know that it is not delusion: how is he sure that it is not even fraud? He will answer that the writing bears the marks of sobriety and truth; and that in many cases the bearers of this message to mankind sealed it with their blood. Granted with all my heart; but whence the value of all this? Is it not solely derived from the fact that men, *as we know them*, do not sacrifice their lives in the attestation of that which they know to be untrue? Does not the entire value of the testimony of the Apostles depend ultimately upon our experience of human nature?"(b)

Indeed we may quote from a well-known legal writer to the effect that the experience of the law Courts is not the experience which is most favourable to the discovery of whether the witnesses are speaking the truth or not, but rather the experience which is gained outside them: "The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required; but it is only in exceptional cases that questions arise which present any legal difficulty, or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a judge is not to be learnt out of books. In so far as it can be

---

(a) L. T. Hobhouse, *Theory of Knowledge*, p. 295.

(b) J. Tyndall, on *Miracles and Special Providences*, R.P.A., Edn., p. 105.



acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a judge is by no means peculiarly favourable. People come before him with their cases ready prepared and give the evidence which they have determined to give. *Unless he knows them in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another.* The rules of evidence may provide tests, the value of which has been proved by long experience, by which judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections ; but they do not profess to enable the judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical experience of the judge, not upon his acquaintance with the law of evidence.”(a)

3. The following is Professor Stout's description of the mental state in Doubt : “ Whenever there is any kind of felt inconsistency, there is a physical conflict. It arises whenever a conscious process tends to take a plurality of incompatible directions. We may adduce as a typical instance of conflict in one of its highest phases the mental attitude of a man who in pursuing a journey on foot, comes to cross-roads and cannot decide which is the right one to take. This is a case of conflict involved in mere doubt or suspense ; that involved in logical contradiction may be illustrated by the mental attitude of a person who hears from two equally credible witnesses opposite statements concerning the same fact.”(b)

The essence of doubt is that the mind can take two lines : “ in the case of complete doubt ” says the same writer, “ it is equally easy to frame the thought *A B* and its opposing alternative *A C*. In the ideal case of complete assurance it is impossible to frame the thought *A B* ; so that we are absolutely constrained to think *A C*. Between complete doubt and complete assurance there are all means of gradation proportioned to the difficulty of

(a) Stephen, Introduction to the Indian Evidence Act, Edn. 1872, pp. 41-42.

(b) Stout, Analytical Psychology, Vol. I, pp. 281-2.

mentally substituting *AC* for *AB*.”(a) Doubt then is not a quality relating to ideas or things, but a feeling, a state of the mind itself, and to speak of anything as doubtful in itself is incorrect. It is only when there is an alternation of ideas that doubt arises : thus Professor Wundt says “ the statement that doubt is the compound of the feelings of acquiescence and repugnance is certainly a true description of the alternating affective states which go to constitute the entire mental process. But there seems to be present in addition a resultant total feeling directly corresponding to the dissension in the emotional condition. There may be moments of doubt when neither the feeling of acquiescence nor the feeling of repugnance is in consciousness at all ; and these moments possess a unique affective character which does not appear to be analysable into either of the other two feelings which displace it from time to time : but it may continue to exist alongside of them. At such moments therefore there exist three feelings, those of acquiescence and repugnance and the total feelings resulting from the two, but qualitatively different from them.”(b) And again “ in doubt and in dissonance the resulting feeling is determined to a far greater extent by the characteristic alternation of ideas than by the nature of the ideas themselves. The total feelings in particular are always essentially dependent on some peculiarity of the alternation and succession of ideas.”(c)

**Doubt & Disbelief  
distinguished.**

Such being the nature of doubt it is necessarily a state of uncertainty, and it, and not disbelief, is the proper psychological opposite of Belief. Disbelief indeed is a totally different mental state and in fact resembles Belief. ‘ We never disbelieve anything except for the reason that we believe something else which contradicts the first thing.’(d) ‘ Belief and Disbelief are but two aspects of one psychic state, the real psychological opposites of belief are doubt and enquiry.’ “ The whole distinction of real and unreal, the whole psychology of Belief, Disbelief and Doubt, is thus grounded on two mental facts—*first*, that we are liable to think differently ; and

(a) Stout, Vol. II, p. 241.

(b) Wundt, Human & Animal Psychology, p. 219.

(c) *Ibid.*, p. 222.

(d) W. James, Principles of Psychology, Vol. II, p. 284.



*second*, that when we have done so, we can choose which way of thinking to adhere to and which to disregard. The subjects adhered to become real subjects, the attributes adhered to real attributes, the existence adhered to real existence; whilst the subjects disregarded become imaginary subjects, the attributes disregarded erroneous attributes, and the existence disregarded an existence in no man's land." (a)

It is sometimes a difficulty with Magistrates and Judges that they cannot come to a conclusion on one side without appearing to disbelieve a witness who seems to them respectable, and it is frequently argued by advocates, that, as the judge decided so and so, he disbelieved such and such a witness without giving any reasons for doing so. But the conclusion that there must have been disbelief on the judge's part is not necessarily correct for disbelief is not merely want of belief but the attributing of falsity to some assertion or fact. It has a positive basis like all negatives. (b) You may, that is, doubt without disbelieving, and in fact you must do so, for it is only when doubt is gone that you can either believe or disbelieve. What has in fact happened is that the judge has failed to make up his mind either on the whole case, if it be a criminal one, and remaining in a state of doubt has, as it is called, 'given the accused the benefit of the doubt,' or, if it be a civil case in which some decision has to be given for one side or other, he has remained in a state of doubt as to that witness's evidence and so has practically excluded it from consideration and given his verdict without reference to it on the other testimony. You may argue that such an attitude is illogical or even impossible: as to the first we have nothing to say, but as regards the second we see nothing psychologically impossible about it. It is merely a case of ceasing to attend to the idea suggested by that witness's evidence and ideas which are not attended to, as soon as they cease to be held before the mind, give place in the mental struggle for existence and fade away: afterwards when the advocate argues the case he brings this evidence specially into attention and it may then appear difficult to understand how it could have been excluded from consideration at the time, but this

---

(a) W. James, pp. 290-1.

(b) F. H. Bradley, *Mind* N. S. 49, pp. 4-5.



is because it is now held prominently before the mind. And for more on this point we must refer to the remarks on attention; here we will conclude by quoting in support of our statement the words of Dr. Schiller "if we desire to entertain contradictory beliefs. . . we have merely to refuse to think them together. This indeed is what the great majority of men have always done." (a) There is another kind of case which we have come across occasionally and which we desire to mention in case others have had the like experience. It is one in which the evidence on one side has been entirely uncontradicted and is in itself sufficient to prove the case and further has not appeared to be intrinsically improbable, yet we somehow do not feel convinced that it is true. The natural explanation would seem to be that the facts asserted though uncontradicted were not real and this, as explained in paragraph 2, would mean that they did not accord with our own experience. No doubt such cases do occur and we then have the feeling that the whole affair is made up. But in the case we are referring to this is not the explanation, because, as we have said, we can point to nothing improbable in the story. Strange as it may seem, we believe that the reason of our want of conviction is here a purely subjective one and springs from the fact that the case is so easy a one that we have to put forth no effort to arrive at the truth. We thus lack the feeling of having overcome an obstacle which usually tends to confirm us in the view that we have reached the truth. This explanation was suggested to us by some remarks of Mr. H. R. Marshall on the subject of Belief. He says that belief involves the establishment of realness and the establishment of realness in belief necessarily follows doubt. An object which remains uncontradicted fails to arouse belief just in so far as its realness is not questioned and fails of recognition. (b)

4. Now that the nature of doubt has been explained and in what respect it differs from disbelief we are in  
**Reasonable Doubt.** a position to discuss 'Reasonable Doubt' an expression used in the definition of Proof already quoted. And first will be cited some directions concerning it which have been

---

(a) F. C. S. Schiller, *Humanism*, p. 53.

(b) H. R. Marshall, *Consciousness*, pp. 357-8.

given in law.(a) In the case of *Queen v. Castor* it was said "but the doubt to the benefit of which the accused is entitled must be such as rational thinking, sensible men may fairly and reasonably entertain : not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. They must be doubts which men may honestly and conscientiously entertain." This is lengthy but hardly assists as it does little more than define 'reasonable' in terms of reason. Again in the case of *R. v. Manning and Wife* it is said "If the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty." This is a favourite dictum which may be found quoted in most of the Indian legal text-books, but it appears to us to rest on a wrong basis. The gravity of the concerns has nothing to do with the matter : it is this notion which appears also in such advice as the following, "the fouler the crime is, the clearer and plainer the proof of it ought to be," "the greater the crime, the stronger is the proof required for the purpose of conviction," and "on capital charges and charges of murder especially, a double degree of caution is requisite."(b) As L. C. J. Dallas said in the case of *R. v. Ings* "nothing will depend upon the comparative magnitude of the offence : for be it great or small every man is entitled to have the charge against him clearly and satisfactorily proved," and to demand more than this by way of proof is plainly to go beyond reason, as it seems to us Sir Elijah Impey did in the case of *Nuncomar* where he is reported to have said "you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner."

Nor, again, can we consent to Mr. Mayne's somewhat similar method of treating the subject. After quoting s. 3 of the Evidence Act concerning proof, that author remarks "It is evident that the whole question turns upon this : when should a prudent man act

---

(a) The various dicta quoted here are to be found on pp. 115-7, Ameer Ali & Woodroffe's 5th Edn. of the Indian Evidence Act unless otherwise stated.

(b) Best on Evidence, § 553.



upon the supposition that a fact exists, when he only considers its existence to be probable? This depends, as the Act says, upon the circumstances of the case. Where a man's own interests only are concerned, a prudent man may act upon very slight evidence, where the interests of others are concerned, he will probably require stronger evidence. A prudent man who is asked to take into his service a person who lies under a suspicion of theft, will probably act upon the supposition that the charge was true and refuse to employ him. If the charge is first made after the man has entered his service, he will require stronger evidence to dismiss him on account of it, and still stronger to charge him with the theft.' '(a) Such considerations do not make the doubt itself reasonable or otherwise, they merely influence the man's conduct with reference to the doubt: they help him to determine to what extent other interests shall prevail with him against the doubt the existence of which he acknowledges. When it is said in s. 3 of the Evidence Act that "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists," we do not understand by the words 'under the circumstances of the particular case,' considerations such as whether the man himself will alone be affected by his action or whether others' interests will also be concerned. It is rather meant that regard must be had to what opportunities there are of evidence coming to light in each case, and where there is less likelihood, *e.g.*, of witnesses having seen the act, &c., the prudent man will act on less evidence. If this interpretation is not correct, and Mr. Mayne is right in his view, we can only regard this portion of the Act as misleading.

The truth is that doubt being a feeling or state of the mind it cannot be made to vary according to the importance or non-importance of the crime—a notion which is merely due to intellectual timidity,—nor yet according to the persons affected by it, &c., but we must seek some grounds of explanation relating to the mental state itself, the essence of which is, as we have already said, the ability of the mind to take two lines. Now belief may be destroyed

---

(a) Mayne, Criminal Law of India, 3rd Edn., pp. 240-1.



either by an actual collision with facts, when it is simply rejected, or by an attempt to think otherwise and this attempt is often made simply to see how far it will succeed. Thus Professor Stout says, "So in climbing up the series of means towards an end we may test the stability of the several links by a mental effort to dissolve their connection. In proportion as the attempt proves abortive, the more we are furthered in our progress. On the other hand, the more easily we find it possible to realize in thought opposite alternatives, we become less confident and less energetic in our pursuits of the object along the special line." (a) He then quotes Herbert Spencer's well-known test "the inconceivability of the opposite" and accepts it as a test of belief though not of truth, on the ground that what is unthinkable at one time may not be so at another when we have further evidence.

It seems therefore that a doubt is reasonable or not according to the extent to which you can think the opposite or alternative of the proposition affirmed.

Now a caution must be added here, that this is not equivalent to saying that the doubt is reasonable or not according as you can think the prisoner innocent or not under any circumstances, but according as you can think him innocent without altering the conditions which you hold established on the evidence. This qualification must be insisted on, for people are prone to alter unconsciously the conditions and sometimes even do it consciously; in the latter case they merely become advocates for the one side or the other, in the former they are prejudiced unknown to themselves.

"As I sit writing," says Professor Stout, "I see a candle before me: the sight of it suggests irresistibly the present possibility of touching it by a movement of my arm, and I believe that I can so touch it. The cause of my believing that I am able to do so is that I cannot by any effort represent myself as unable *except by representing the conditions as altered*." (b)

We believe that the juryman who asks himself can I really conceive the accused innocent under the circumstances shown, *i.e.*, without interpreting the facts to mean anything other than

---

(a) Stout, *op. cit.*, Vol. II, p. 241.

(b) Stout, *op. cit.*, Vol. II, p. 251.

my experience tells me they naturally would mean, will soon be satisfied as to whether there is or is not a reasonable doubt as to his guilt.

Though we are averse to the introduction of the idea of prudence into the interpretation of reasonable doubt, we agree with the method adopted by Sir J. F. Stephen as leading to a conclusion which is in substantial conformity with our own, though expressed no doubt in less psychological terms. "The question," he says, "what sort of doubt is 'reasonable' in criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypothesis of falsehood on the part of the witnesses can never be said to be more than highly improbable.

"Though it is impossible to invent any rule by which different probabilities can be precisely valued, it is always possible to say whether or not they fulfil the conditions of what Mr. Mill describes as the Method of Difference; and if not, how nearly they approach to fulfilling it. The principle is precisely the same in all cases however complicated or however simple, and whether the nature of the enquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses or unknown or suspected facts by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts, that one hypothesis is proved. If more than one hypothesis is consistent with the known facts, but one only is reasonably probable—that is to say, if one only is in accordance with the common course of events—that one in judicial enquiries may be said to be proved "beyond all reasonable doubt." The word 'reasonable' in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed), and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence."(a)

How this view is related to our own will appear more clearly when we come to speak of probability later on, under which head recurrence is made to the nature of reasonable doubt. We cannot however accept his further statement that the degree of probability

---

(a) Stephen, Introduction to the Indian Evidence Act, pp. 36-7.

which it is necessary to show is identical with the question "what risk of error is it wise to run, regard being had to the consequences of error in either direction?" (a) This would justify the view already objected to that the fouler the crime the plainer must be the proof, and it ignores the fact that Belief and Doubt are emotional and intellectual operations which are not at all dependent upon the consequences which will result from the course of action adopted. This conclusion is an erroneous one caused by a mistaken attempt to use the prudent man as a standard by which to measure doubt.

5. Our experience is that while it is considered necessary to give reasons for belief, it does not seem to be considered equally necessary to give reasons for doubt at all events in criminal cases, and even the highest Appellate Courts will reject evidence on some general ground such as that it has not the ring of truth or stamp of reality or some such catch phrase.

This attitude is often irrational and it appears to us that where one idea holds the field it ought to prevail in the absence of something positive to the contrary, and there are psychological grounds founded on the nature of doubt for holding this view. For you only doubt or reject something offered on the basis of some positive knowledge. "Even the extreme of theoretical scepticism," says Mr. Bradley, "is based on some accepted idea about truth and fact. It is because you are sure as to some main feature of truth or reality that you are compelled to doubt or reject special truths which are offered you." (b) And again "It is impossible rationally to doubt where you have but one idea. . .doubt implies two ideas, which in their meaning and truly are two; and without these ideas, doubt has no rational existence. Where you have an idea and cannot doubt, there logically you must assert. . .if an idea does not contradict itself, either as it is or as taken with other things it is at once true and real." (c)

There then follows a passage which we are constrained to say accurately applies to more than one judgment of an Appellate Court

---

(a) *Ibid.*, p. 51. For a further discussion of this author's views, see §§ 11-13 of the present chapter.

(b) *Appearance and Reality*, p. 512.

(c) *Ibid.*, p. 514.



that we have seen, "He who wishes to doubt when he has not before him two genuine ideas, he who talks of a possible, which is not based on actual knowledge about Reality—it is he who takes his stand upon sheer incapacity. He is the man who admitting his emptiness then pretends to bring forth truth. And it is against this monstrous pretence, this mad presumption in the guise of modesty, that our principle protests." (a)

Now what we maintain is that these doubting Judges whom we have in mind have no positive knowledge of any description to serve as a basis of their doubts, and that they merely take advantage of their position to assert dogmatically that a thing is probable or improbable: but you will never convince anyone by this method unless you state your experience and it happens to correspond with his.

And since we have mentioned 'the ring of truth' we may here remark that while an Original Court may legitimately speak of such a thing, it appears to us rather nonsense for an Appellate Court to do so. For 'the ring of truth' is present or absent in a narrative not so much according as it corresponds to the experience of the hearer, which is rather the question of probability, but according as the events were associated with feelings in the past, which feelings are now revived by the narrator; and it is only the person who actually hears the narrative and sees the gestures and demeanour of the witness who can judge this. This is the reason why witnesses are often said to act their narrative, (b) and why made-up stories sound hollow, for these cannot have been associated with any feelings in the past and therefore when they are told there are no feelings to revive. Thus it is, as Professor James explains, that we are not affected by what we are told we did when children "and partly because no representation of how the child *felt* comes up with the stories. We know what he said and did; but no sentiment of his little body, of his emotions, of his psychic strivings as they felt to him, comes up to contribute an element of warmth and intimacy to the narrative we hear, and the main bond of union with our present self thus disappears.

---

(a) Appearance and Reality, pp. 514-5.

(b) C. D. Field, Law of Evidence, 5th Edn., p. 50.

It is the same with certain of our dimly recollected experiences. We hardly know whether to appropriate them or disown them as fancies, or things read or heard and not lived through. Their animal heat has evaporated : the feelings that accompanied them are so lacking in the recall, or so different from those we now enjoy, that no judgment of identity can be decisively cast.”(a)

Indeed many Appellate Courts appear to us to exhibit such perversity in their manner of dealing with the judgments of the lower court, that we are constrained to record our view at some length. We heard it stated by a District Magistrate, whose reputation as a judge was high among those who knew him, that the only way he found to prevent his decisions being upset on appeal was to write a very short judgment and practically to give no reasons, except of the most general kind, for his decision. He said that, if he gave reasons at any length, the appeal became a mere discussion of those reasons, the advocate suggesting all kinds of counter reasons and arguments why the Magistrate’s reasons might be wrong and the appellate judge occupying himself in demolishing the Magistrate’s reasoning. Both the advocate and the judge seemed to lose sight of the facts proved and of the possibility that much else had influenced the lower court in its decision, all of which could not be set out in the shape of logical grounds, and apparently considered that when they had been able to suggest contradictory or alternative inferences, they had overturned all on which the conviction was based. On the other hand, if he gave no reasons, or none of a kind that provided opportunity for such discussion, the arguments on appeal had to be with reference to the facts as proved in the record and the appellate judge was unable to assume that he knew all the grounds which had influenced the Magistrate and had disposed of them and that nothing else remained.

Clearly such a state of affairs is most unsatisfactory, and we think that the whole of this trouble is in fact due to ignorance of the manner in which the decision of the lower court is necessarily reached. It has been explained in Chapter II, paragraph 11, that the way to find the truth is to grasp it as a whole by intuition

---

(a) James, *op. cit.*, Vol. I, p. 335.

rather than to reach it deductively by arguing down from part to part. Reality is not to be reached by an elaborate construction of thought, but is given in immediate experience : the truth of the case has been won by the Magistrate in this way, it has been felt and experienced by him rather than accepted as the result of logical reasoning, and the grounds of his judgment are merely a subsequent attempt to account for his decision which must necessarily be inadequate. For he is now compelled to cut up the whole into parts and deal with it piecemeal : he has to make a conceptual construction in doing which he excludes much that influenced him and destroys connections which were in his mind, and so loses the general or total effect of the impressions which chiefly caused the feeling of conviction. Further than this, he cannot in his reasons express at all what these impressions really were to him, because they appeal to his experience and knowledge of the past, and spring from circumstances too numerous and sometimes too minute to record in a judgment. Some of them may even have been mere suggestions not given by any words which the record contains and the grounds of which cannot be explained, for they lie in the experience of the person who accepts them.

The frame of mind of the Magistrate while hearing the case is, we conceive, that which is described by Prof. James as the impulsive result of summation of stimuli and not reasoning. It comes through dispersing the attention impartially over the whole, surrendering one's self to the general outlook : one thus gets a total effect in its entirety which is lost upon the man who is bent upon concentration, analysis and emphasis. The person who has the general impression does not give any reason for it, but feels it : he is guided by a sum of impressions not one of which is emphatic or distinguished from the rest, not one of which is essential, not one of which is *conceived*, but all of which drive him to a conclusion to which nothing but that sum total leads. The man who seeks to make some one impression characteristic and essential prevents the rest from having their effect.(a)

That judges do trust to their general impression of the case which cannot be analysed seems to be recognised by Sir James Stephen

---

(a) W. James, Principles of Psychology, Vol. II, pp. 350-1 note.



in the following passage :—" Upon the whole it must be admitted that little that is really serviceable can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observation and practical experience. Such observations are seldom, if ever, thrown by those who make them into the form of express propositions. Indeed for obvious reasons it would be impossible to do so. The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood ; and if he did, his observations would probably be of little use to others. Everyone must learn matters of this sort for himself, and though no sort of knowledge is so important to a judge, no rules can be laid down for its acquisition." (a)

The same writer also states much the same with reference to Juries :—

" The general impression left by a trial is like the general impression left by a book or conversation. Great part of it is forgotten even before the conclusion is reached, but the effect remains, though the cause passes out of sight. The hearer of a complicated mass of evidence will come to a conclusion in his own mind as to whether or not it has produced the result at which it was directed, just as a reader of a long argument may, at the end, be satisfied that the author has proved his point, though he could not repeat the steps of the proof. Jurymen form their opinion by degrees, as the case goes on. They feel that this or that point is established, that this or that witness is discredited or is deserving of confidence, nor is the value of these conclusions much diminished by the fact that those who form them are often unconscious of the particular steps by which they are reached. It is in this way that many of the most important opinions and resolutions in life are formed. Who can specify all the reasons why he likes this man or that, or embarks upon this or that undertaking ?" (b)

---

(a) Stephen, *Introduction to Evidence Act*, p. 57.

(b) Stephen, *A general view of the Criminal Law of England*, p. 207.

It would be well if advocates and Appellate Courts could understand this process and grasp these two main points, namely (1) that the reasons in the judgment do not exhaust the value of the decision; and (2) that the record necessarily cannot contain all that has contributed to produce the feeling of conviction in the Magistrate. Then perhaps we shall have less unwarranted interference with decisions on questions of fact, and less feeling on the part of the Magistrates that it is simple waste of time to spend days in trying cases when their efforts are discounted in the present perverse manner, the most important part of the matter being left entirely out of consideration.

6. The influence of Feeling on Belief is too well known to be disputed, and Belief itself is said to be more allied to the emotions than to anything else. **Belief and Feeling.** Here, therefore, it will simply be explained why this is so and how the influence of feeling is exercised.

In the first place we believe that of which we are certain and which seems to us real, and emotion and desire, as we have already said, are frequent indirect causes of subjective certainty. Again to be real a thing must be both interesting and important, and thus reality means relation to our emotional and active life.<sup>(a)</sup>

"Belief," says Professor Sully, "involves an element of feeling: when we believe we are satisfied or at rest,"<sup>(b)</sup> hence, *e.g.*, the happiness of persons strongly affected by religious beliefs and their certainty of future salvation. Unfortunately however—or fortunately—the intensity with which a belief is held is no guarantee of its truth, a fact which seems to be forgotten by some who think it sufficient to express their own certainty on a point in order that it may be accepted by others. The value of such a declaration to others is simply in proportion to their opinion of the declarant's honesty and intellectual capacity.

As regards the honesty with which a belief is held, there is no doubt a criterion sometimes to be found in the **Belief and Action.** fact that action did or did not follow it; but such criterion is not always correct, for some men frequently shape

(a) James, *op. cit.*, Vol. II, pp. 283, 295.

(b) Sully, *Outlines of Psychology*, p. 300.



their conduct contrary to their real beliefs, either because they cannot shake off a habit or from a conviction of the inutility of prosecuting a course of action which will not be acceptable to others or likely to succeed in the present state of their surroundings. Bain considers that such cases are no exception to the rule that what we believe we act upon, and explains them as instances in which one motive is overpowered by a stronger one,<sup>(a)</sup> but even if it be correct that belief, in the absence of strong counteracting influences, is always followed by action, the converse is by no means true. We often have action where there is no true belief, and in every instance in which a false charge or complaint is laid against any one, it is clear that action has been taken in the absence of a true belief in the person's guilt. In charges, *e.g.*, of rape, considerable stress is usually laid on whether an immediate complaint was made by the woman or not, and this is merely an instance of using action as a test of belief.

There is, however, another aspect of the relationship which consists in the view that the impulse to action causes belief. Thus Professor Sully says, "the occurrence of this inhibition of active impulse by doubt will further depend on certain organic conditions. In cases where the vital energies are high, and the motor system is vigorous and predisposed to activity, the active impulse will be strong and not easily checked. Not only so, belief is itself conditioned in part by the same organic factor. Where there is a powerful disposition to act, there confidence tends to be high, whereas when the vital energies are low, and as a consequence, the active impulse is weak, distrust is apt to creep in."<sup>(b)</sup> As an illustration of this there occurs to mind the loss of confidence of the Athenian General Nikias in the Sicilian war after he had been stricken by disease. But it is not merely a matter of health: "Belief stands in a peculiarly close relation to activity. In most cases, at any rate, it involves the incipient excitation of impulses to look out for a particular result and to follow a particular line of action. Owing to this organic connection with action, belief may be influenced by strengthening the active elements. Thus we all know an eagerness

---

(a) Bain, *Mental and Moral Science*, p. 372.

(b) Sully, *op. cit.*, pp. 418-9.



to do something tends to favour the belief that would justify us in doing it, *e.g.*, our power to accomplish our purpose, the rightness of the action, the worthiness of the object, &c.”(a)

This suggests that when judging as to the honesty of a person's belief when he acted in a certain way, merely to reflect on how the matter would have appeared to us under the circumstances, is often not a sufficient test ; we must further allow for the fact that we have no disposition to action, while he had an impulse to act which on psychological principles would have affected his belief. No doubt this requires some imagination on the judge's part, but without it we are clearly liable to be misled.

Similar is the effect of desire on belief, which cannot be omitted from consideration in such cases if we are to come to a correct conclusion. “If a certain objective combination,” says Prof. Stout, “presents itself as the only condition or the most favourable condition, of obtaining a certain end, the active tendency towards this end is *of itself* a tendency to believe in the objective combination.”(b) As to the way in which Desire acts, the following is the same writer's account :—  
 “This influence of Desire on Belief often operates by simply diverting the attention from counter evidence . . . . . The mind is so absolutely pre-occupied by certain tendencies, that whatever crosses them either never comes before consciousness at all, or, if it does, is immediately dismissed . . . . . It also directly intensifies the resistance offered by a mental combination to conditions which might otherwise dissolve it . . . . . But the more often they (*i.e.*, such beliefs) are acted upon, the more completely they become incorporated with the original conation so as to become an integral part of it ; hence the support they receive from it is increased.”(c)

With this may be compared the manner in which Feeling in general influences Belief : “This action of feeling on belief is in every case mediate ; that is to say, it works by modifying the processes of ideation themselves. It is by giving preternatural vividness and stability to certain members of the ideational train called up

(a) Sully, *op. cit.*, p. 305.

(b) Stout, *op. cit.*, Vol. II, p. 254.

(c) Stout, *op. cit.*, Vol. II, pp. 255-6.

at the time, *e.g.*, ideas of occurrences which we intensely long for, or especially dread, and by determining the order of ideation to follow not that of experience but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type.” (a)

7. Feeling then acts in part by warping the intellectual element in Belief. This intellectual element depends largely on association of ideas: “the frequent experience of a succession leaves a firm association of the several steps, and the one suggests readily all the rest. This enters into belief and augments in some degree the active tendency to proceed in a certain course.” (b) The doctrine of association of ideas is explained under the head of ‘Memory’ and we have already alluded to the importance of association by contiguity in paragraph (2) of this chapter; now, it is the principle of association by contiguity and similarity, which explains why it is that a judge is always inclined to accept as true an incident related of which he himself has had similar experience. For his past experience enables him to ‘realise the idea by setting it in definite relations of time and space,’ while the judge who has no such experience of the country and people cannot do it, and finding the idea strange to him is more likely to reject it on account of its hostility to his preformed associations and existing mental disposition.

On the same ground we can understand why some defences carry conviction while others, which in themselves appear to be strong, are easily rejected by the Magistrate. James Mill maintained that all cases of belief are referable to indissoluble association, and, though this is not correct, it is true that cases of indissoluble association are *ipso facto* cases of belief. But Prof. Stout points out this relative inseparability is not merely dependent on the strength and intimacy of the association between the ideas connected, but also on the absence of counter associations: “The closest association between *A* & *B* fails to enforce the combination *AB*, if this combination is opposed in any instance by sufficiently powerful counter associations . . . . On the other hand, a com-

---

(a) Sully, *op. cit.*, p. 304.

(b) Bain, *op. cit.*, p. 379.



paratively feeble association may command belief, merely from the absence of counter association.”(a) Now, when the evidence for the prosecution is concluded, there is usually an association of ideas set up in the Magistrate’s mind between the facts related and the guilt of the accused, and the defence to succeed must set up a counter association between the facts and some other explanation. Thus, if the facts are represented by *A* and the guilt of the accused by *B*, the connection *A B* must be altered to one *A C*, but it is of very little use to try and produce a connection *B C* which has no direct association with *A*. A mere *alibi*, therefore, which only indirectly counteracts the facts proved, has not nearly the same influence on the Magistrate’s mind, as the defence which accepts these facts but explains them otherwise, for the *alibi* neglects *A* altogether. A good advocate knows this and always has a theory to account for the prosecution’s case, and very rarely leaves it alone and relies on an *alibi*. To connect the crime with the prosecution’s chief witness is a particularly effective defence, because it at once serves to break the original association between *A* and *B*, and to create a new and opposite one between *A* and *E*: this once done it is not easy to retrace the old association; for the nervous current has been diverted, and the mind is now able to take two directions from *A*, which, as we have pointed out above, is the essential condition of doubt.

The effect of imagination on belief is through the formation of vivid ideas: dwelling on these we come to regard them as representative of reality. But such Beliefs are usually momentary in persons of normal mind and immediately corrected on reflection, because the ideas are not definitely localised in time and space.(b) The well known danger of playing with an idea is partly due to the fact that what is constantly attended to is thereby strengthened and partly to ideo-motor action, *i.e.*, the tendency of an idea to realise itself in action.

8. It has been said that the Inconceivability of the Opposite Truth, is a test of Belief but not of Truth as Herbert Spencer claimed for it. Many writers do not

(a) Stout, *op. cit.*, Vol. II, p. 252.

(b) Sully, *op. cit.*, pp. 236, 301.



profess to give a test of truth or consider that the test varies with the purpose to be served and so speak of the “useful, efficient, workable, to which our practical experience tends to restrict our truth-valuations.”(a) If we must adopt one it will have to be ‘consistency’ in some form: “Everywhere alike,” says Mr. Underhill, “consistency of all the elements with the whole and with each other—the elements both of knowledge and of practice—is the only and the ultimate test of truth,”(b) and consistency is really Mr. Bradley’s test, which he applies both to Truth and Reality. He speaks of self-contradiction as the test of reality which denies inconsistency and asserts consistency, and says that an assertion is false because reality does not admit of two inconsistent (discrepant) events.(c)

The consistency, however, in practice must be with our knowledge and with our experience, and when we speak of a thing as impossible we mean that it is so because it contradicts positive knowledge; because, that is, it cannot be unless something which we hold as true, is, as such, to be given up. As, however, our knowledge is finite and fallible it may always be that what is at one time impossible is at another possible, but the stronger and more systematic and fully organised a body of knowledge becomes, so much the more impossible becomes that which in any point conflicts with it.(d)

In section 56 of the Indian Contract Act, it is said that, ‘an agreement to do an act impossible in itself is void,’ and this is distinguished by the commentators as ‘intrinsic impossibility’ as opposed to what is ‘merely impossible relatively to the person agreeing’ and they give as an instance of the latter kind of impossibility, an agreement by a pauper to pay Rs. 10,000, which would be impossible with reference to his resources, but not inherently impossible. In the former case of intrinsic impossibility the contract is void but not in the latter case of relative impossibility.(e)

(a) F. C. S. Schiller, *Humanism*, p. 59.

(b) G. E. Underhill, *The Use and Abuse of Final Causes*, *Mind* N. S. 50, p. 239.

(c) *Appearance and Reality*, pp. 136, 139, 190.

(d) *Appearance and Reality*, pp. 391, 537, 542-3.

(e) *Cunningham and Shephard's 9th Edn. of the Indian Contract Act*, p. 188.

We think ourselves that the distinction drawn is not really a valid one ; it is as much inherently impossible for a pauper, so long as he remains a pauper, to pay Rs. 10,000, as it is for a man to walk 100 miles an hour or to discover treasure by magic (examples apparently given of intrinsic impossibility), and it is only by conceiving the conditions altered and the man no longer a pauper—a form of fallacy alluded to earlier in the chapter—that you can speak of his agreement as other than impossible, whatever shade of meaning you may assign to the latter word. For so far as possibility goes both agreements are equally contradictory of man's positive knowledge. With respect to the agreement to discover treasure by magic, it is said, “ it is immaterial that some people think the thing to be possible, for there are many in this country that think it possible to discover treasure by magic ; still an act is not necessarily impossible because it is not yet known to be possible, for in a more advanced state of scientific knowledge the possibility of it may come to be demonstrated.”

The latter statement is undoubtedly correct and is the reason why the inconceivability of the opposite cannot be taken as the test of truth : the former statement is open to doubt, and indeed what the whole sentence really points to is that there is no such thing as the intrinsically impossible. To be ‘ impossible in itself,’ according to the commentators, a thing must be ‘ absolutely and generally impossible,’ and to know this we must have an all-embracing knowledge of reality which we do not possess, as they themselves say. For it is only when we have exhausted the field of possibility that we can speak of a thing as absolutely impossible.

The same remarks apply to Sir Frederick Pollock's instances. An agreement, he says, “ may be impossible in itself ; that is, the agreement itself may involve a contradiction, as if it contains promises inconsistent with one another or with the date of the agreement, or the thing contracted for may be contrary to the course of nature, *quod natura fieri non concedit* as if a man should undertake to make a river run uphill ; to make two spheres of the same substance, but one twice the size of the other, of which the greater should fall twice as fast as the smaller when they were



both dropped from a height ; or to construct a perpetual motion.”(a)

Now the first class of cases are impossible not because of anything intrinsic in the matters themselves, but because our knowledge of existence or, if we prefer it, our experience of what we call reality, our conception of the time-relation, &c., teach us that the co-existence asserted contradicts what we know : the second class of cases is only the same thing put in other words. For there is no such thing as a course of Nature existing apart from our knowledge, and such a conception merely betrays ignorance of the true meaning of Nature. It is an “ unwarrantable assumption that the realm of Nature is primary, independent, and complete in itself . . . . Nature, as we conceive it, is, on the contrary, merely an abstract scheme and that, as such, it necessarily pre-supposes intellectual constructiveness, and motives to sustain the labour that such construction entails.”(b) As we have already explained(c) the laws of Nature are simply what our knowledge makes them, and vary with it. The error of all these descriptions arises from the attempt to regard things as possible and impossible, not as related to other things, but somehow out of all relations : whereas ‘ possible ’ and ‘ impossible ’ have no meaning except in relation to thought and simply are the ways we relate or fail to relate anything to reality.

Sir F. Pollock himself comes to a somewhat halting conclusion not very far off our own, when after quoting Brett, J., that in these cases of intrinsic impossibility “ the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties cannot be supposed to have so contracted ;” he adds “ It seems to follow then that the question is not whether a thing is absolutely impossible (a question not always without difficulty), but whether it is such that reasonable men in the position of the parties must treat it as impossible.”(d) This translated into our language would be “ whether it contradicts the positive knowledge of reasonable men in the position of the parties,” though for ourselves, for the reasons elsewhere given, we should prefer to avoid

---

(a) Pollock, *Principles of Contract*, p. 398.

(b) J. Ward, *Naturalism and Agnosticism*, Vol. II, p. 247.

(c) See p. 226.

(d) Pollock, *op. cit.*, pp. 400-1.



reference to 'the reasonable man.' It constitutes, however, an admission that this form of impossibility is relative and not absolute; though the same writer does proceed to speak of these cases as 'the first or objective kind of impossibility.'

9. Few judges who give reasons for their conclusions fail to refer to Probability, and the books on Evidence are full of allusions to it. "The foundation of this (that is judgment)," says Best, "is the probability or likelihood of that agreement or disagreement, of that truth or falsehood deduced or presumed from its conformity or repugnancy to our knowledge, observation and experience." (a) And again "By probability, as already observed, is meant that likelihood of anything to be true deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible. There is likewise moral impossibility which, however, is nothing more than a high degree of improbability." (b)

If then impossibility is that which contradicts man's positive knowledge, probability is that which is in conformity with it. This, however, is not sufficient as a definition, for probability implies further some degree of uncertainty which arises from the fact that we are not in possession of full knowledge of the matter: what we pronounce to be probable agrees with such knowledge or experience as we have, but we feel that the knowledge is insufficient. "There are stages of belief," says Mr. Hobhouse, "in every gradation between certainty and doubt, containing admixtures of truth and error in every proportion; and this for the simple reason that the grounds are not always discovered at once, but are revealed to the enquirer bit by bit." "Now just as full certainty has or may have its rational ground, so also may lower degrees of belief, and to this ground

---

(a) Best on Evidence, § 7.

(b) Best on Evidence, § 24.

the term 'probable' has reference." (a) The same writer goes on to state that the object of reason in employing partial knowledge is (1) to form conclusions which, without being always true, will approximate to truth more nearly than any others, and (2) with regard to any given conclusion to maintain that state of belief which will serve it best relatively to other considerations, speculative or practical. A probable conclusion then is one which is not merely held, as a matter of psychological fact, with a certain degree of felt conviction. It is one which ought to be so held; that is to say, it is held on grounds which, on the above principles, justify such a degree of belief, no more and no less. It must rest accordingly, (1) on certain known facts, and (2) on certain methods of forming conclusions from those facts. (b)

This seems to be an accurate description of what the judge's mental attitude should be: what seems probable at one stage of the case must be held so only so far as it is remembered that at present it rests on partial grounds; with further evidence and more knowledge the grounds become wider and the degree of conviction greater on either one side or the other, but to fail to recognise the provisional character of the first conclusion is to adhere blindly to a theory which rests on insufficient basis and is a mark of one of the worst forms of prejudice. It is the attitude of the woman who prides herself on judging character at first sight and never being wrong, which merely means that she is unable to change her first conviction formed on partial knowledge, be the facts what they may.

It now remains to examine how in the first place we come to adopt one conclusion rather than another as probable. It has already been explained that this depends on our knowledge, observation and experience: whatever is in accordance with this is in the first instance regarded as probable, and hence the enormous advantage of the man who has the greater experience. Any observed uniform relation is a possible basis for generalization, and "on the one hand each element of likeness between a given case and a known ground is *pro tanto*, in the absence of other knowledge, a consideration in favour of the consequent. On the other

---

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 291-2.

(b) *Ibid.*, p. 292.

hand, every difference is a counter consideration. The balance of the two gives us a degree of probability which is thus dependent on the degree of likeness." The more frequently therefore anything has happened in our experience, the more probable it appears that it will happen again, and it is this average frequency which the law of probability lays down.(a)

And if we choose to follow this line we can arrive at another conception of what is reasonable doubt in somewhat less psychological terms than the one already given in para. 4; "Reasonable and unreasonable, logical and illogical, may be sounds signifying nothing, or may merely express certain common ways of believing or forming beliefs. . . . The true criterion of the reasonable then, is the actual conformity of its conclusions with fact; while conversely, that which does not lead us to conformity with fact can have no claim to be considered reasonable"(b) and by 'fact' must be understood that partial knowledge which constitutes our experience. We are then justified in doubting a thing in so far as it is not in conformity with what we ourselves have experienced, and so it will follow that the narrower our experience, the more we shall regard ourselves justified in doubting, and our views of 'reasonable doubt' will vary in inverse proportion to our experience.

10. Reference has already been made to Proof, and our analysis of the Probable will now enable us to distinguish it from Demonstration and to show what kind of possibility may be legitimately excluded from consideration. "You may show," says Mr. Bradley, "that every detail we know points towards one result, and we can find no special reason for taking this result as false. And having done so much you have certainly proved your conclusion. But, even after this, a doubt remains with regard to what is possible. And unless all other possibilities can be disposed of you have failed to demonstrate."(c)

This statement, it seems to us, cannot be improved on, and considering the partial character of human knowledge we are

---

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 294-5, 298-300.

(b) *Ibid.*, p. 291.

(c) *Appearance and Reality*, p. 325.



justified in neglecting the remaining possibilities whatever they may be, when we have reached the result described above as proof.

We have not in this chapter treated of truth-speaking which belongs rather to the general subject of evidence, but we shall here apply to it conclusions drawn from probability, as to why a European's evidence may legitimately be preferred to that of a Native witness; for we wish to contest the theory that 'a black man's word is as good as a white man's.'

The view disputed is based merely on numerical equality, and the old utilitarian theory that every man is to count for one and no one for more than one, and this being so, as Bentham said, 'Pushpin is as good as Poetry.' Now it is obvious that if probability means conformity with our experience, and our experience is to the effect that the European is habitually more truthful than the Native, we are justified in regarding it as probable that in any individual instance in which their statements are contradictory, it is the European who is speaking the truth. Indeed to do otherwise is to discard what we ordinarily use as a test of truth, and to embrace instead a standard, *viz.*, that of numerical equality, which our experience has informed us is inapplicable to all mankind so far as veracity is concerned. It is true that in some cases the native witness or witnesses may be on oath and the European may be an accused who is not speaking on oath, but here again if our experience is that the sanctity of an oath has little or no binding force on one race while it has on another, the probability of its influencing the matter will be determined accordingly, and it is then mere folly to affect to conclude that because one race has shewn in the past that an oath is revered among it, therefore the same must necessarily be true of all races.

Each Magistrate or Judge will have had his own experience on the subject, and it is almost needless to say that he should use it fearlessly regardless of theories and the apparent simplicity of the numerical equality view, but for the sake of the weaker folk who do not care to face the music unless they can make a show of arguing on paper, we subjoin two reasons why it would naturally be expected that the European would be the more truthful witness.



into enquiries as to the witness' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next.(a) It seems to be generally admitted that an oath to have any value requires that the witness should have a belief in some Avenging Power or in a future state of rewards and punishments.(b) The fact therefore that no attention is any longer paid to the religious beliefs or the want of religious beliefs of the witness, as well as various provisions of the Indian Oaths Act, seem to show that it is no longer considered that an oath is a guarantee that a witness will speak the truth.

The utility of oaths is a disputed matter,(c) some even holding that they tend to cause perjury,(d) which, if true, is important with reference to the argument that a confession is less trustworthy than ordinary evidence, because it is not made on oath. We do not doubt that in some cases oaths remove the intention to hide the truth, and that they are useful in curbing misstatements by focussing the attention on the details of the statement. But as against this it is suggested by Prof. Munsterberg that the memory may not always be improved in every respect by increased attention. It sometimes works better unconsciously. He also thinks that the administration of an oath is partly responsible for the wrong valuation of evidence : a man may state on oath only that of which he is certain, but, as the experiments on memory and observation already recounted show, the subjective feeling of certainty is not also an objective criterion for the desired truth.(e)

Another subject of some interest is the comparative merit of affirmative and negative evidence and the possibility of proving a negative. We find the following statement :—

**Affirmative and  
Negative Evidence.**

“ Upon general principles affirmative is better than negative evidence. A person deposing to a fact which he states he saw

(a) Ameer Ali and Woodroffe, O. C., pp. 798, 800-1.

(b) Best on Evidence, §§ 57, 134, 161.

(c) *Ibid*, § 59.

(d) T. H. Buckle : History of Civilisation, Chap. V, where he also quotes Archbishop Whately to the same effect. F. Paulsen : A System of Ethics Translation Thilly, p. 671.

(e) H. Munsterberg : Psychology and Crime, pp. 47-49.



must either speak truly, or must have invented his story, or it must be a sheer delusion. Not so with respect to negative evidence; a fact may have taken place in the very sight of a person who may not have observed it: and if he did observe, may have forgotten it," and just previously it is said that if two men were present and one says a fact occurred and the other denies its occurrence, greater weight should be attached to the witness alleging the affirmative.(a)

These remarks appear to be of doubtful validity; the witness alleging the affirmative does not necessarily either speak truly or else purposely invent his story. He may exaggerate the facts or may omit to mention some and so create a wrong impression; this is a frequent source of error. The arguments from sight and memory are also open to dispute: a man may misinterpret what he sees as much as he may fail to observe, and he may confuse in memory events which have happened at different times just as easily as he may entirely forget. This is amply illustrated in the Chapters on The Senses and Memory.(b) It appears also that the nature of a negative is not sufficiently understood: it is explained elsewhere that we assert a negative on the basis of a positive idea, and when we say that we do not remember that a fact occurred, it is because we recollect a state of things which was inconsistent with the facts whose occurrence we deny. Unless we recollect this, we usually do not make a definite statement at all, at all events when we are in a Court of Law. It depends therefore on the manner in which the negative evidence is given.

The preference of one kind of evidence to another does not really depend on affirmation and negation, but mainly on the interest of the observer, of which examples are given in this volume *passim*. As regards the possibility of proving a negative the same commentators say:—

“ Words are but the expression of facts; and therefore, when nothing is said to be done, nothing can be said to be proved; which is probably what is meant by the expression ‘ *per rerum naturam, factum negantis probatio nulla est* ’ ” to which is attached the following note, “ Best on Presumptions, 39, 40; and so in Co. Litt.

---

(a) Ameer Ali and Woodroffe, O. C., pp. 4-5.

(b) Chapters VI and V, *ante*.

it is laid down broadly : ‘ It is a maxim in law that witnesses cannot testify a negative, but an affirmative.’ From these and similar expressions it has been rashly inferred that ‘ a negative is incapable of proof ’—a position wholly indefensible, if understood in an unqualified sense.’

The opening words, which are a quotation,(a) if they really do represent the true meaning of the saying that ‘ a negative cannot be proved ’ reduce it to a colourless truism. Best construes the words ‘ *per rerum naturam, factum negantis probatio nulla est* ’ as meaning simply that in the ordinary course of things the burden of proof is not to be cast on the party who merely denies an assertion.(b) Whatever may be the correct interpretation of the Latin maxim, it appears to us that there is no objection to the assertion that a negative cannot be proved, if it is taken to mean ‘ directly ’ proved as opposed to indirectly. It is only possible, so far as we know, to prove a negative by establishing something positive which is inconsistent with the fact you wish to negative, and this follows necessarily from the nature of negation itself. There is no such a thing as a bare negative idea ; every negative has a positive basis, it excludes in virtue of something positive which is incompatible with what is excluded. This explains why an *alibi* is such a popular defence : it is the most obvious way of proving something inconsistent with the fact alleged, and so establishes the denial or negative of it.

It is, we believe, unfortunately correct that untrue confessions of guilt are sometimes made. These are generally attributed in India to torture or threats on the part of the police or some one in authority : sometimes they are made with a view to exculpate others : yet, again, they appear occasionally to be made when in the face of very incriminating evidence the accused sees no hope of establishing his innocence. About these we have nothing to say. There is, however, a different class of cases which occur now and again when the judgment is overthrown, and the mind being in a state of complete subjection and prostration, an untrue confession is made, the person confessing really believ-

---

(a) Ameer Ali and Woodroffe, O. C., p. 630.

(b) Best on Evidence, § 270.



ing himself guilty. In such cases the story is often fabricated with much ingenuity and tact. As an example of these Prof. Munsterberg instances the case of the Salem witches who in the seventeenth century admitted that they were guilty of witchcraft, some of them undoubtedly believing in their confessions, which they made to tally with the statements of their accusers. These people were not insane but their minds were overpowered by the accusation. According to Prof. Munsterberg's explanation of one of these cases, a dissociation of the mind set in: "the emotional shock brought it about that the normal personality went to pieces, and that a split off second personality began to form itself with its own connected life story built up from the absurd superstitions which had been suggested to her through the hypnotising examinations." Such confessions were given "with real conviction, under the pressure of emotional excitement, or under the spell of overpowering influences. Even the mere fatigue often brought to the Salem witches the loosening of the mental firmness and the intrusion of the suggestion of guilt." (a)

These confessions have a similarity to the self-accusations of the melancholics, but differ from them as they are the result of a temporary abnormal state of a brain not diseased. Although the man is not ill, hysterical and auto-hypnotic states may combine with otherwise perfectly abnormal behaviour and produce false confessions. An extraordinary instance is quoted by Prof. Munsterberg, in which a revolver was pointed at a man, and the brightness of the metal hypnotised him and caused his consciousness to split and a neurotic mind developed an illusory memory as to its own doings in the past. In this state the man confessed: afterwards the period of disintegration was suddenly again eliminated from the memory, the normal connections entered again into play and the confession was denied. Two other similar instances are given. (b) Such cases no doubt rarely occur, but we mention them chiefly because little sympathy is usually shown for a person who makes an untrue confession, if it results in his conviction. It is felt that he himself is to blame for the mistake made. The case,

---

(a) H. Munsterberg: *Psychology and Crime*, pp. 145—8.

(b) *Ibid.*, pp. 161—170.



however, is altered when the confession is due to the judgment being overpowered by the emotional shock. It may also be observed that in this class of cases the confession may easily be attributed wrongly to the wickedness of the police or others, when it appears that the confession is false, whereas it may have been wholly due to suggestion acting on the emotionally excited mind with which suggestion the police had no connection.

12. We propose to conclude this chapter with a criticism on the views of a well-known writer on Truth, Belief and Reasonable Doubt. Sir James Stephen objected to a proposal that a certain number of scientific men should, under circumstances, sit upon juries, on the ground that this assumes that the object of judicial trials is the attainment of truth simply, and that scientific men are more likely to attain it than others. He urges that "the result to be reached is not truth simply but such an approach to truth as the average run of men are capable of making, and that this result is more likely to be found in the opinions of common than in those of scientific jurors." (a)

The question to be tried is not whether the man is guilty, but whether the jury have any reasonable doubt that he is guilty, and the juror is not a scientific enquirer but has only to say whether or not certain evidence satisfies his mind. As he regarded it, the minds of twelve men who represent the average intelligence of the country have to be satisfied, and that is the standard of proof created by the legislature. (b) These men are to use the established opinions of the bulk of the Society in which they live and apply them to the matters that come before them, and on this ground he defends the decisions of juries in the past convicting persons of such crimes as witchcraft, which are now regarded as impossible. "It is clear," he says, "that they could not have acted otherwise than they did, and that it would have been an unreasonable proceeding on their parts to enter upon what was then regarded as the fanciful speculation which denied that witchcraft ever took place." (c) And again, "Their (*i.e.*, of the public) reasonable demand is, that no

---

(a) Stephen, *A general view of the Criminal Law of England*, pp. 209-10.

(b) *Ibid.*, p. 264.

(c) *Ibid.*, p. 211.

one shall be punished unless his guilt can be proved on grounds which the bulk of the nation at large can understand. An omniscient and infallible judge who decided by processes unintelligible to the world at large would not give satisfaction, for though his decisions might always be right, no one could check them.” (a)

Let us try and realise what this amounts to. It seems to us a deliberate rejection of knowledge by the ignorant, on the ground that because their minds can be satisfied without it that is sufficient. It is a setting up as the lawyers’ standard of truth the comprehension of the less as against the intelligence of the more educated, and of those who have specially devoted themselves to the study of matters which have to be decided in a law Court, but which are not easily intelligible to the ordinary mind. One can realise and perhaps appreciate the attitude of the man who prefers *Cum Platone errare quam cum istis vera sentire*, but what is to be said of the class of men whose motto is *malo cum istis errare quam cum Platone vera sentire* ! Could such a notion appeal to any but the legal intellect, and if it is pursued, is there not an end at once of all progress in every sort of knowledge and an indefinite postponement of all prospect of arriving at the truth in any but the most ordinary matters ?

Logically followed it would condemn the appointment of judges, in countries where trials are not by jury, of any persons whose intelligence is superior to that of the man in the street, it would completely exclude the appointment of educated European judges to decide the cases of Indians and other native races, because the latter would not be able to check the decisions of the former ! The European judges here would be very much in the position of the omniscient and infallible judge deciding by processes unintelligible to those around him, whose decisions our author would consider unsatisfactory. The Legal Science is as much an expert Science as any other to the plain man, and lawyers clearly claim to be experts, if not to have the monopoly of such knowledge ; the barrister judges who deal with the technicalities of law decide cases ‘ by processes unintelligible to the world at large,’ *ergo* their decisions are unsatisfactory, and they are not the type of judges required. We do not see how such a result can be avoided according to our author’s

---

(a) Stephen, A general view of the Criminal Law of England, p. 213.



reasoning, and though the conclusion may not perhaps be unwelcome to some readers, we doubt if the grounds on which it proceeds would be accepted by any.

13. We will now pass on to the same writer's views on Belief and Reasonable Doubt. "The desire to act and the desire to act successfully are ultimate facts in human nature ; but we are so constituted that all actions involve belief, and the world is so arranged that all successful action involves true belief. Hence the ultimate reason for believing is that without belief men cannot act. And the reason for believing what is true, is, that without true belief they cannot act successfully ; thus the advantage derived from true as distinguished from false belief, and not the bare fact that the thing is true, is the reason for believing what is true..... Hence, belief is not a mere impression which the mind receives passively from the contemplation of facts external to it, but an active habit involving an exertion of the will." (a)

He subsequently applies this view of belief to reasonable doubt as follows :—"What doubts then are reasonable ? That depends upon the explanation already given as to the nature of belief. Where it is not wise to believe, it is wise to doubt, and the wisdom of belief, in any particular instance, is a question of the balance of advantages. In every intelligence which is not omniscient there is room for doubt on every subject, for such an intelligence can never assert that if its knowledge were increased its present belief would not be changed" (b) . . . . "Thus whether or not a given man at a given time is as a matter of fact certain of a given conclusion, or whether he feels doubt about it which he will call reasonable, is a question of fact ; whether he shall put his mind into such a state, is a question of expediency and one of the gravest importance a question which depends not on any one consideration, but on a comparison of several, the most important of which are the reasons for forming an opinion, the consequences of the opinion when formed, the weight and completeness of the testimony, and the probability of the matter testified to. The force of any one of these

---

(a) Stephen, *A general view of the Criminal Law of England*, p. 242.

(b) *Ibid*, p. 260.



reasons for belief may be so great as to make a man unconscious of the presence of the others for the time being " . . . . (and he finally concludes) " To try and set a precise limit to these processes—to attempt to give a specific meaning to the word " reasonable " in the phrases ' reasonable doubt ' or ' reasonable conjecture ' is trying to count what is not number, and to measure what is not space.(a)

Now, in the first place, it seems to us that effects are here attributed to a wrong cause. We do not deny that what we believe about the future often influences the actual event so far as it depends on our actions. So far faith is an actual force, but, as Mr. Hobhouse says, " What has operated in these cases is not the insufficiently grounded belief but the attitude of will, the resolute, high-spirited, unswerving determination which carries a man on. And from this distinction we may learn a lesson which may be applied in other cases. It is not the ungrounded and perhaps incorrect belief which is intrinsically valuable, but the state of feeling, emotion, and will from which that belief issues and to which it ministers. In practical affairs, in so far as the premature belief itself is essential, there is too often the Nemesis of rashness or other misdirection of effort, and if philosophical analysis is to be applied to these matters, it must surely be allowed to go below the surface, and separate what is of genuine value from what is superabundant and possibly hurtful."(b)

<p>Criticism of the above views.</p>	<p>Next, the assertion here is that the reason for believing what is true is not that the thing is true itself, but that a true belief brings advantages to the believer while a false belief brings disadvantages to him. But if the consequences of a belief are what makes it true, how can a person recognise that a belief is true before he knows its consequence ? And if he does not recognise it as true at the time he forms the belief, but only after subsequently coming to know the consequences is able to say that the belief is true, how can it be said that the consequences have in any way influenced him to form a true belief ? What is subsequent in time cannot be the cause</p>
--	---

(a) Stephen, *A general view of the Criminal Law of England*, p. 262.

(b) L. T. Hobhouse, *Faith and the will to believe*, *Aristotelian Society Proceedings*, 1903-4, p. 91.

of what precedes it, unless by 'cause' you mean 'purpose,' 'end,' &c., which is evidently not the meaning here when 'the reason for believing what is true' is spoken of.

It appears to us that there is considerable confusion in the reasoning in the shape of conclusions which do not legitimately follow from the premisses. In the first place it cannot be argued, as our author argues, that because all successful action involves true belief, therefore the success of the action is the reason for believing what is true. This is simply an inversion of the antecedent and consequent: the belief must be prior to the action as it is said that without belief men cannot act, and, therefore, if there is any case of cause and effect, the correct inference to our mind would rather be that the truth of the belief is the cause of the successful action and not *vice versa*.

Secondly, it does not follow that because the ultimate reason for *believing* is that belief is necessary to *action*, therefore the reason for believing *what is true* is that without *true* belief we cannot act *successfully*. Here additions have been made to both sides of the equation that are not the same by the introduction of the terms 'true' and 'successful:' to take 'successful' as synonymous with 'true' is simply to beg the whole question at issue, for it is equivalent to assuming outright that that only is true which is advantageous. Assert if you like that this is a self-evident proposition, and possibly you will get some to accept it, but do not pretend to arrive at this conclusion by the species of syllogistic reasoning employed in the present passage.

But let us look at the matter in another way. To believe anything is to believe that it is true, so that its truth must be conceived of as something different from its consequences. For it is absurd to say that the truth of a belief consists in the consequences of its truth, for in the very act of identifying its truth with its consequences, you are opposing them one to another.

Is it then meant that a belief is true because it (and not its truth) has practical consequences? If so, what are the consequences of a belief as distinguished from those of its truth? We confess that we can give no answer to this: that true beliefs have practical consequences we admit, but we believe in the consequences



because we believe in the truth, and settle the question of truth or falsehood independently. (a) How this is done we shall now explain by a reference to psychology.

14. It may be urged against the view we have been criticising that in addition to its other defects such a theory only takes account of half the facts.

Psychological explanation of true and false beliefs.

Faith in a fact may help to create the fact provided our own activity enters into the determination of the fact, but not otherwise. (b) So long as a man is strenuously aiming at the achievement of practical ends, only certain combinations of ideas are possible to him, because others would check action: the urgency of practical needs may make it necessary for him to come to a decision at any cost however scanty his materials for doing so may be. In such a case as, *e.g.*, of a man who climbs a cliff to escape death from drowning, he must form a belief consistent with action because of the advantage to him of doing so. His mental activity, however, may be directed towards other ends, and if his mind is not bent on the achievement of practical results, entirely different combinations of ideas may be possible for him, provided that they do not involve an explicit contradiction. Now the judge or the juror who has to form a decision in a case has no such urgent practical need to action as the man, *e.g.*, who has to jump an abyss to avoid some other danger: his practical need is limited to the necessity of coming to some decision, and as either a right or wrong decision will accomplish this object, it is not clear that he will derive any particular advantage from having a true belief in the matter. A belief which is in fact false but which is helpful to him by enabling him to solve some contradiction or difficulty which has arisen, is one which he would be likely to cling to, if the advantage of the belief were the sole reason of its formation. What restrains him here is his own connected system of ideas, his own preformed system of beliefs: these prevent him from arbitrarily selecting any means to the desired end, and only allow him to make certain mental combinations which do not collide with them.

---

(a) Cf. The Criticism of the Pragmatist view of Truth by H. W. B. Joseph in *Mind*, N. S. No. 53, pp. 29-30.

(b) James, *Will to Believe*, pp. 24-5, 59-60.



We maintain that the theory we are criticising only takes account of half the facts because it explains the formation of beliefs entirely by the influence of subjective needs, whereas they can never be the sole factor.(a) It is true that in striving after an end we strive after the belief which alone makes action with a view to that end a psychological possibility, and that the subjective factor thus constitutes the impelling motives for the formation of belief, but this is not a complete explanation. There is also the objective factor in belief which controls and limits subjective activity so as to enforce one way of thinking and to make other ways difficult or impossible : we call it objective to distinguish it from the other factor and because it may appear to proceed from the nature of external objects, but what is really operative is the association of ideas or view of objective relations which has already been formed in the past. It is merely a subjective connexion of ideas which has become a system and excludes the connexion of things or events suggested by the new association. It is the side of belief which appears to us to play the chief part in doubt, and when we say that doubt is reasonable or not according to the extent to which you can think the opposite or alternative of the proposition affirmed,(b) we are simply asserting that a thing is really doubtful or not according as the association of ideas it suggests conflicts or does not conflict with the established system of ideas of the thinker.

If this be true, it appears to us misleading to say that "belief is not a mere impression which the mind receives passively from the contemplation of facts external to it, but an active habit involving an exertion of the will," because you cannot disregard your established system of ideas and make what belief you like by mere exertion of the will : nor again is it true that 'doubt is a question of the balance of advantages.' It is not in your power to make it such, nor can a man 'put his mind' into a state of doubt according as it is expedient or not, as he cannot control the extent to which a suggested ideal connexion will conflict with his existing system of ideas. When Sir James Stephen concludes with

---

(a) See Stout, *Manual of Psychology*, p. 567, and his Chapter on Belief, *passim*, which is largely borrowed from here in the text.

(b) See page 313, *supra*.

the assertion that the question of doubting or not depends chiefly on the reasons for forming an opinion, the consequences of the opinion when formed, the weight and completeness of the testimony, and the probability of the matter testified to, we should exclude the first two considerations altogether as an explanation of doubt, and should describe the last two as being really the same from different points of view and both ultimately explicable by the test which we have suggested above.

## CHAPTER X.

### FEELING—IMAGINATION—PREJUDICE—HABIT.

Feeling and Emotion—The instinctive and motor character of Emotional expression—Demeanour of Witnesses and parties—Effect of Emotion on the Intellect—and on Belief—Measurement of traces of emotion by experimental Psychology and its use for discovering truth—Application of the Association method to the detection of crime—In what Modesty consists—The Offence of Assault with intent to insult the modesty of a Woman—Surprise—Imagination—its basis is observation and reproduction—it is limited by experience—An example given of seeking for analogies in one's own mental life—Prejudice—in observation—in thought—due to habit and the influence of the feeling on ideas—Habit—its effect on the legal mind—The legal presumption that what is, continues—its validity when applied to character and opinions—Continuity and habit not the same—of what character consists—Evidence of character in law—Evidence of reputation distinguished from evidence of disposition—Unsatisfactory nature of the former.

THE effect of Feeling and the Emotions in Attention, Memory, Belief, Will and Action is spoken of elsewhere in the chapters relating to those subjects : here a few further remarks will be given which do not come appropriately under those heads. Feeling cannot be defined, but the conditions under which it arises can be stated and the relations obtaining between the ideas present at the moment of its appearance. Feelings are always subjective and imply an affection of activity of the self, ideas have an objective reference : Emotions like feelings are subjective processes, but they involve change in ideation and re-actions in the organs of movement. Feelings are not accessible to external observation until they pass over into emotions.(a)

The importance of the emotions is recognised in law in the stress which is laid on the observation of demeanour of witnesses, and we shall first try to show the reason of this by an explanation of the motor character of emotion. “ The foundation of emotional life,” says

---

(a) Wundt, Human and Animal Psychology, pp. 211, 218, 372.



Ribot, "rests in tendencies whether conscious or not (consciousness in all this playing but a secondary part), and the only positive idea we can get of these tendencies is to consider them as movements (or as inhibitions of movements), be they real or nascent. A craving, an inclination, a desire always imply motor innervation in some degree or other." (a)

Proclivities, inclinations, desires—all these words and their synonyms signify a nascent or miscarried movement according as it is capable of being evolved to its extreme limit or is obliged to undergo arrest of development. The state of concomitant consciousness may indifferently appear or disappear; the tendency may be conscious or unconscious; yet the motor innervation none the less remains as the fundamental element. (b)

The fact that the emotions have their root in the organism renders them less liable to control and makes them a valuable index of the feelings, for, as Darwin expresses it, they are independent of the will: "Certain actions which we recognise as expressive of certain states of mind are the direct result of the constitution of the nervous system, and have been from the first independent of the will and to a large extent of habit." (c) Similarly Professor Sully speaking of the expression of the emotions says it is 'a wide ranging reflex motor excitation involving some at least of the 'voluntary muscles as well as those by which the vital actions, *e.g.*, circulation, digestion are carried out, and finally, the nerve structures which are known to influence the action of the several secreting organs, as the salivary and lachrymal glands. This reflex diffusion of the nervous excitation in emotional stimulation is a primitive fact of our organisation. It shows distinctly in the first weeks of life. It has much in common with those reflex movements which are brought about by congenital arrangements, and which, as we shall see later on, form one of the main rudiments of voluntary action. What we call the expression of an emotion is merely that part of this reaction which is observable to others, and which helps us to read one another's feelings.'" (d)

---

(a) Ribot, on Attention, p. 110. (c) Darwin, Expression of the Emotions, p. 66.  
 (b) *Ibid.*, p. 11. (d) Sully, Outlines of Psychology, p. 342.

Some writers hold that the movements are not merely expressions of the emotions but actually part of them. Thus in hypnotic experiments it was found that the expressive movements given by the experimenter to different parts of the body are always immediately reflected in the countenance, which thus completes the expression. If, *e.g.*, the fists are clenched, the brows contract and the face expresses anger. It is said that "the chief conclusion to be drawn from these studies is the influence exerted on psychical activity by the expressive movements of the countenance and the whole body. The expression is not merely an external sign of the emotion, but it forms an integral part of it. Even in the normal state, when an expression is artificially produced it gives rise to the corresponding emotion which passes away when the expression changes," and Burke's words are quoted that he had often experienced the awakening of the passion of anger in proportion as he assumed the external signs of that passion.(a)

Professor James goes so far as to maintain that the usual view, namely, that the mental perception of some fact excites the mental affection called the emotion, and that this latter state of mind gives rise to the bodily expression, is wrong and that the facts rather are that "the bodily changes follow directly the perception of the exciting fact, and that our feeling of the same changes as they occur, is the emotion."(b) Although this theory is not generally accepted the great importance of these movements which constitute the expression of the emotions is everywhere admitted, and the difficulty of simulating emotions owing to the larger number of parts modified in each emotion has elsewhere been remarked on.

It is stated by Prof. Sully that there is in man and all gregarious animals a paramount need of expressing pleasure and pain more deeply laid even than the need of expressing thoughts by a significant language. To this is due the instinctive definiteness and uniformity of emotive expression among members of the same species. In the case of all the more primitive emotions, such as fear, anger, love (in certain of its forms), the characteristic

To what extent the expression of the emotions is uniform in different races and individuals of the same race.

(a) Binet and Féré, *Animal Magnetism*, pp. 277—280.

(b) W. James, *Principles of Psychology*, Vol. II, p. 449.



signature is in its main features common to all members of the species. Their manifestation shows itself in early life as a strictly instinctive re-action. But the movements making up emotional expression are only in part instinctive: there is a large margin of diversity of expression observable among different races and nationalities due to the effects of imitation and education.<sup>(a)</sup> It is this connection with instinct which explains the uniformity of these expressions, and why this should be so is further explained by the analysis of another writer. Mr. McDougall states that the innate psycho-physical disposition, which is an instinct, consists really of three parts, an afferent, a central and a motor or efferent part, whose activities are the cognitive, affective and conative features respectively of the total instinctive process. The first is the organised group of nervous elements that receive and elaborate the impulses initiated in the sense organ by the native object of the instinct. From this (the afferent) part the excitement spreads over to the central part of the disposition which determines the distribution of the nervous impulses, especially the impulses that descend to modify the working of the visceral organs, the heart, lungs, blood vessels, glands, and so forth, in the manner required for the most effective execution of the instinctive action. The nervous activities of this central part are the correlates of the affective or emotional aspect of the total psychical process. The excitement of the efferent or motor part reaches it by way of the central part: its constitution determines the distribution of impulses to the muscles of the skeletal system by which the instinctive action is effected.

Now while the afferent or receptive part and the efferent or motor part are capable of being greatly modified in the course of the life of the individual, the central part remains unmodified. The emotional excitement, with the accompanying nervous activities of the central part of the disposition, is the only part of the total instinctive process that retains its specific character and remains common to all individuals and all situations in which the instinct is excited. Hence, though one may learn to suppress the bodily movements in which the excitement of the instinct of pugnacity naturally finds vent, or may adapt these movements more finely

---

(a) Sully, *The Human Mind*, Vol. II, pp. 63, 67—9.



to secure the end of the instinct, one can exercise little if any control over the violent beating of the heart, the flushing of the face, the deepened respiration, the general distribution of blood supply and nervous tension which constitute the visceral expression of the excitement of this instinct, and which are determined by the constitution of its central affective part. These visceral changes will usually be accompanied by the innately determining facial expression in however slight a degree; hence result the characteristic expressions of the emotion which, as regards these main features, are common to all men of all times and all races.(a)

Mr. McDougall calls emotion the affective aspect of instinctive process, and if this be realised we shall now understand how it is that men can control so little the expression of their emotions and why these expressions are uniform in character. The importance of this lack of control will be seen further when we speak of the manner in which Experimental Psychology measures emotion and exposes the innermost feelings of the criminal by the association method. We have not space here to set forth all the outward signs of the expressions of the various emotions. They would include actions of muscles of the limbs, face and vocal organs, movements of the eye and mouth, *e.g.*, in happy emotion; re-actions in the organs of respiration, circulation and digestion: thus we have the disturbance of the respiratory process in sobbing, the pallor in fear due to vaso-motor action, the excitation of the lachrymal gland in weeping. In fear also we see the disturbance of the heart's action known as palpitation, tremor of muscles, certain alterations in the secretions (*e.g.*, saliva).(b) Each of the well-marked species of emotion has its characteristic group of re-actions of which detailed accounts are given by several writers, and to these we must refer the reader.

2. It is not, therefore, surprising that there are numerous decisions as to the importance of demeanour and that for this reason it has been laid down that "in all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to

---

(a) W. McDougall, *An Introduction to Social Psychology*, pp. 33-4; 41-2.

(b) Sully, *O. C.*, Vol. II, pp. 63 and 67.

the opinion formed by the judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it.”(a) Further both in the Civil and Criminal Procedure Codes Courts are empowered to record remarks on the demeanour of witnesses, and one of the chief objections to issuing commissions for the examination of witnesses at a distance has been held to be that it deprives the judge who is trying the case of the opportunity of observing their demeanour. We cannot help feeling that too little attention is often paid to this advice, and this is the main reason which has led us to explain the importance of the emotions by reference to their instinctive and motor character. The treatment of the subject, *e.g.*, by Best seems somewhat brief, and though quotations are given acknowledging how important the matter is, more space is devoted to minimising what is to be gained by it than one would naturally expect, and the general effect is to leave the reader under the impression that the results of such observation are too uncertain to be really valuable.(b) We also find it stated by other legal commentators that presumptions may be drawn from conduct of parties, *e.g.*, of “fear indicated by passive deportment, as by trembling, stammering, starting, etc., or by a desire for secrecy, *e.g.*, as by disguising the person or choosing a spot supposed to be out of the view of others.”(c)

In so far as this purports to describe the demeanour of a person under the emotion of fear, it has to be remembered that other emotions cause at least some of these symptoms and that fear is itself accompanied by different outward manifestations on different occasions. It does not always render the person passive or quiescent : he as often takes to flight, for in fear conative tendency is at once excited and obstructed and when the psychical activity is barred in certain directions it diverts itself into whatever channels it can find. When an animal is excited by fear it frequently rushes wildly into the danger it seeks to avoid.(d) Laboured breathing, palpitation, trembling, &c., are expressions of actual bodily pain as well as

---

(a) See the cases quoted by Ameer Ali and Woodroffe, 5th Edn. of the Indian Evidence Act, p. 111, Note 4.

(b) Best on Evidence, §§ 21, 446.

(c) Ameer Ali and Woodroffe, O. C., p. 143.

(d) Stout, Manual of Psychology, pp. 312—8.



of strong fear, and fear does not always arise from pain. According to Best, several of the symptoms which occur in fear are also indicative of disease as well as of surprise, grief, anger, etc.(a), and we think it must be admitted that for this reason wrong inferences may sometimes be drawn. This source of mistake has been indicated by Wundt in the following passage :—" The physical concomitants stand in no *constant* relation to the *psychical quality* of the emotions. This holds especially for the effects on pulse and respiration, but it is true also for the pantomimetic expressive movements. It may sometimes happen that emotions with very different, even opposite kinds of affective contents, may belong to the same class so far as the accompanying physical phenomena are concerned. Thus, for example, joy and anger may be in like manner Sthenic emotions. Joy accompanied by surprise may, on the contrary, present the appearance on its physical side of an Asthenic emotion."(b) It is well to bear this caution in mind, but the writer can himself recollect instances in which the demeanour of the witnesses so plainly indicated the falsity of their evidence as to alter completely the effect of their statements which on paper were not inconsistent with one another and so indicated nothing wrong.

Especially when dealing with less civilized races can we obtain information by observing their emotions, for the control of the emotions is a product of civilization and is natural only to the morally and intellectually mature consciousness. " Generally," says Dr. Ward, " in the particular movements indicative of particular emotions the primary and primitive effects of feeling are overlaid by what Darwin has called serviceable associated habits. The purposive actions of an earlier stage of development become, though somewhat atrophied as it were, the emotive outlet of a later stage : in the circumstances in which our ancestors worried their enemies we only show our teeth."(c) If, therefore, we learn to read them aright, observation of the emotions of Eastern races will doubtless prove unusually instructive, and the study of psycho-

---

(a) Best on Evidence, § 466.

(b) Wundt, Outlines of Psychology, p. 193.

(c) J. Ward, Art. Psychology, Encyclopædia Britannica, 9th Edn., Vol. XX, p. 72.



logy which embraces the subject cannot fail to assist, for it classifies the symptoms which follow the different states of mind.

3. Emotion is a great source of illusion because it disturbs intellectual operations. It gives a preternatural vividness and persistence to the ideas answering to it, *i.e.*, the ideas which are its excitants or which are otherwise associated with it : hence when the mind is under the temporary sway of any feelings as, *e.g.*, fear, there will be a readiness to interpret objects by help of images congruent with the emotion. A man under the control of fear will be apt to see any kind of fear-inspiring object whenever there is any resemblance to such in the things actually present to his vision.(a) The same writer also says that we habitually think the thoughts that please us, those which connect themselves with and gratify our feelings.

The state of emotion (apart from its promotion of the flow of ideas if it be not too strong) is antagonistic to thinking, which implies at the moment a certain subsidence of the feelings and a considerable suppression of outward action or movement, but to paralyse the intellectual activity it must be very strong.(b) Its more frequent effect is to warp it and cause the person judging to be prejudiced and to bar out all considerations on the other side.

First thoughts, as contrasted with second thoughts, are concerned with emotion : they are the impulse to act in a certain way, and the fact that they are neutralised by second thoughts proves that they come from a deeper region than thought. They are subconscious, instinctive, and express what is most deeply engrained in us by heredity or most early acquired.

Professor James explains our tendency to believe in emotionally-exciting objects (objects of fear, desire, &c.), as due to the bodily sensations which emotions involve, for the more a conceived object excites us the more reality it has : and he considers the greatest proof that a man is *Sui compos* to be his ability to suspend belief in presence of an emotionally-exciting idea.(c) Now, this power is the result of edu-

---

(a) Sully, *Illusions*, p. 103.

(b) Sully, *Outlines of Psychology*, pp. 37-8, 341.

(c) James, *op. cit.*, Vol. II, pp. 307-8.

cation, and does not exist in untutored minds for which every exciting thought carries credence. He also quotes Bagehot to the effect that 'conviction will be found to be one of the intensest of human emotions and one most closely connected with the bodily state,' and himself concludes that the reason of the belief is undoubtedly the bodily commotion which the exciting idea sets up.

This will explain the movements and excitement of fanatics, the marching of the Salvation Army, the gesticulations of preachers and orators, &c., though such manifestations may be partly due to the tendency, alluded to above, to excite a feeling by first adopting the attitude appropriate to it.

4. The connection between instinct and emotion was explained in paragraph 1, and the lack of control over the expression of the emotions was noticed. This lack of control has been utilised by Experimental Psychology to measure emotional reactions in various ways, and also to arrive at the real knowledge and thoughts of suspected persons in a manner which may prove of use to law and also to the police in the detection of crime. Of this we shall now give some illustrations taken from Prof. Munsterberg's experiments. Owing to the motor character of emotions it is found that all emotional states of the mind are accompanied by slight movements, *e.g.*, of the pulse, of the arm, of breathing, of respiration, of pulsation of the arteries, etc. These movements are involuntary and too faint to be noticed by ordinary observation, but they can be measured by certain delicate instruments invented by experimental psychologists, and they can also be connected with the outer facts to which they are really due.

The use of the automatograph. The automatograph is a plate which lies on metal balls and thus follows every impulse of the hand which lies flat on it; the plate has an attachment by which the slightest movements are recognised on a slowly moving surface. The principle on which it acts is that the thing which awakens our feeling starts our actions towards the interesting object: muscle reading and thought reading proceed on the same principle. The subject is asked to think attentively of a special



letter in the alphabet, and twenty-five cards with letters on them are spread in a half circle about him. It will be found that his arm on the automatograph will quickly show the faint impulse towards the letter of which he thought, although he is unaware of it. So if a witness or criminal in front of a row of a dozen men claims that he does not know any one of them, he will point on the automatograph, nevertheless, towards the man whom he really knows, and whose face brings him thus into emotional excitement.

If it is only required to show the sudden re-action without a definite direction, unintentional muscle contraction will be registered by a rubber bulb or capsule on which the hand lies, as soon as the accused hears the dangerous name of the place of his crime or of an accomplice.

Similar use may be made of eye-movements. Ordinarily our eyes will look in the same direction as the head points. If a man sees and reads a card on which a word is printed which is indifferent to him, then closes his eyes, turns his head sideways and then opens them again, his eyes will look in the same direction in which his head points. If a word which is emotionally important to him is put on the card, after reading it and closing his eyes and turning his head, it will be found that when he opens his eyes, without his knowledge, his eyes have not followed his head but are still turned toward the exciting word. The feeling interest has been betrayed by the unintentional backward rotation of the eye-ball. Hence if an object which was instrumental in the crime or was present at the place of the deed or belonged to the victim is shown to the guilty man, his eyes will follow it.

The pneumograph registers expirations and inspirations. It is attached to the chest and exhibits a wave line on the smoked surface of a revolving drum, which shows the subtlest features of the breathing. You can thus measure every element of such a curve, every change in the length, height, angle, and regularity of the wave, and that means every change in the rapidity, rhythm, distribution, pauses and strength of the breathing. These registrations show the intimate relation between feeling and breath. Pleasure makes the respiration weaker and quicker ;

The use of the  
pneumograph,  
sphygmograph and  
plethysmograph.



displeasure stronger and slower ; acquiescence weaker and slower ; excitement stronger and quicker. The same is true of the heart-beat measured by the blood-wave in the arteries by a pulse writer called the sphygmograph. Pleasure heightens and retards the pulse, displeasure weakens and accelerates it ; excitement makes the pulse stronger and quicker, acquiescence weaker and slower. This instrument is attached to the wrist, and the results may be measured on the same drum as that used with the pneumograph. The plethysmograph shows the quantity of blood which streams to a limb : every emotional excitement speaks in the blood supply of every limb.

The galvanometer shows the variations of resistance to the galvanic current of a battery when the hands are put on two copper plates. Such changes occur if the brain is excited : any emotional disturbance influences the resistance because the activity of the sweat glands in the skin is under the nervous influence of our feelings, and the functioning of these glands alters the electrical conditions. A word we hear excites us and at once the needle of the galvanometer becomes restless.

There are other methods of perceiving emotion in alterations in the angle made in jerking reflex movements of the knee and in changes of the temperature of the body, but it is unnecessary to describe these. Enough has been said to show that psychology can register the symptoms of the emotions and make the observation thus independent of chance judgment : also that it can trace emotions through involuntary movements, breathing, pulse, etc., where ordinary observation cannot do so.

It seems clear that such results may be utilised to a great extent in connection with evidence and crime. Even persons who believe in torture as a means of ascertaining the truth might save themselves trouble and the accused person, in some cases, useless suffering, if they first ascertained whether there was really good ground for supposing that the person whom they had got hold of knew anything about the matter. A test of his emotion by some of the ways indicated above with negative results, should satisfy

Caution with reference to such experiments.

them that they had best leave this man alone and try some one else. It seems, however, that they should not be equally sure from positive results that they had got the right man. The Professor who made the experiments allows that so far they do not give us sufficient hold for the discrimination of the guilty conscience and the emotional excitement of the innocent. His fear of being condemned unjustly may influence the muscles, glands and blood vessels as strongly as if the man were guilty. It is also admitted that these studies are only beginning, and there are still contradictions in the results of various scholars. It seems, therefore, that at present the chief use of the method will be to discover innocence or guilt in cases in which it is desired to find out whether a person knows anything about a certain place, or man or thing. If a new name is brought in, the method is reliable ; for the innocent man, who has not heard it before, will not be excited, while the criminal will show emotional symptoms.<sup>(a)</sup> The method, of course, presupposes that the exciting experience is still accessible to the memory of the person examined, and in the case of a witness it might not be so : it is possible in such cases to sharpen the memory by hypnotism. It is also conceivable that the accused might be too callous to show emotional re-action on mention of his crime, but there would still be the fear of discovery which might affect him in such a case.

5. Connected with the above experiments is the measurement of association of ideas, the method of which will be explained by experiments of the same professor. "Suppose that both my subject and I have little electric instruments between the lips, which, by the least movement of speaking, make or break an electric current passing through an electric clock-work whose index moves around a dial ten times in every second. One revolution of the index thus means the tenth part of a second, and, as the whole dial is divided into one hundred parts, every division indicates the thousandth part of a second. My index stands quietly till I move my lips to make, for instance, the word ' dog.' In that moment the electric

The association  
method.

---

(a) H. Munsterberg, *Psychology and Crime*, pp. 113—133.



current causes the pointer to revolve. My subject as soon as he hears the word, is to speak out as quickly as possible the first association which comes to his mind. He perhaps shouts 'cat,' and the movement of his lips breaks the current, stops the pointer, and thus allows me to read from the clock-work in thousandth parts of a second the time which passed between my speaking the word and his naming the association. Of course, this time includes not only the time for the process of association, but also the time for the hearing of the word, for the understanding, for the impulse of speaking, and so on. But all these smaller periods I can easily determine. I may find out how long it takes if my subject does not associate anything, but simply repeats the word I give him. If the mere repetition of the word 'dog' takes him 325 thousandths of a second, while the bringing up of the word 'cat' took 975 thousandths, I conclude that the difference of 650 thousandths was necessary for the process of associating 'cat' and 'dog'. . . . The slightest changes of our psychical connections can be discovered and traced by these slight variations of time." (a)

Now for the application of the method. You wish to find out whether a suspected person has really participated in a certain crime: he declares he is innocent and is not even acquainted with the locality. An innocent man will not object to proposing to him a series of one hundred associations to demonstrate his innocence: a guilty man cannot refuse and also affirm his innocence, and he will also believe that he can conceal what he wishes. He is asked to speak the first word which comes to his mind when another word is spoken to him. You mix into the list of one hundred words a number, say thirty, which stand in more or less close connection with the crime in question, words which refer to the details of the locality, or the persons present at the crime, or the probable motive, or the professed *alibi* and so on. "The first direction of our interest," says the professor, "is toward the choice of the associations. Of course everyone believes that he would be sure to admit only harmless words to his lips; but the conditions of the experiment

---

(a) H. Munsterberg, O. C., pp. 80-81.



quickly destroy that feeling of safety. As soon as a dangerous association rushes to the consciousness, it tries to push its way out. It may, indeed, need some skill to discover the psychical influence, as the suspected person may have self-control enough not to give away the dangerous idea directly ; but the suppressed idea remains in consciousness, and taints the next association, or perhaps the next but one, without his knowledge . . . . In most cases, however, there is hardly any need of relying on the next and following words, as the primary associations for the critical words unveil themselves for important evidence directly enough.”(a)

Yet not only the first associations are interesting. A second and third repetition of the series is equally so. Most of the words the subject now gives are the same as the first time, but a number will be changed, and it will be found that these are the suspicious ones. “ Those words which by their connection with the crime stir up deep emotional complexes of ideas will throw ever new associations into consciousness, while the indifferent ones will link themselves in a superficial way without change. To a certain degree, this variation of the dangerous associations is reinforced by the intentional effort of the suspected. He does not feel satisfied with his first words, and hopes that other words may better hide his real thoughts, not knowing that just this change is to betray him. But most important is the third direction of inquiry : more characteristic than the choice and constancy of the associations is their involuntary retardation by emotional influence. A word which stirs emotional memories will show an association time twice or three times as long as a commonplace idea. It may be said at once that it is not ordinarily necessary, even for legal purposes, that the described measurement be in thousandths of a second ; the differences of time which betray a bad conscience or a guilty knowledge of certain facts are large enough to be easily measured in hundredths or even in tenths of a second.”(b)

Different people, of course, take different times to make associations, but an average can be obtained for each individual, and we then watch deviations from the average. That a certain asso-

---

(a) H. Munsterberg, O. C., pp. 83-4.

(b) *Ibid.*, pp. 85-6.

ciation should take one and a half seconds would be a very suspicious retardation for the quick mind which normally associates in three-fourths of a second, while it would be normal for the slow thinker. The retardation is not always confined to the dangerous association alone, but often comes in a still more pregnant way in the following or next following association, which on the surface looks entirely harmless. The emotional shock has perturbed the working of the mechanism and the path for all associations is blocked. Although a professional criminal would not show intense emotions and hence not such long retardations, if he were unsuspecting and unaware of the purposes of the experiment, he would do so, if he knew beforehand that it was to determine whether or not he lied. In addition to the lengthening of the simple association time by emotion, there would be a considerable lengthening by conscious effort to avoid suspicion and dangerous associations. No one is able to look out for the harmlessness of his associations and yet to associate them with the average quickness with which the commonplace ideas are brought forth.

In cases where dangerous words show association times of unusual shortness, if there is good reason to believe from the choice of the associations that the man is guilty, the inference is that he is making no effort to suppress the truth: he lets the ideas go as they will without sifting or retouching. In this way you can, to a certain extent, test whether a person who confesses really believes what he says to the Court. If the dangerous words bring no retardation of the association process, though the man knows that the words will unveil his real mind, it is strong evidence that he does not want to hide anything and really believes in his confession. If such an experiment were made with him before the confession, he would have stumbled over every third word, and many of his associations would have taken much longer to make. The short association times show that no real emotion accompanies his memories of crime. It often happens that the experimenter gathers the truth from the replies of the subject, and on putting it to him he will confess.

We have not space here to give concrete instances of experiments of this kind, but such will be found in pages 73-110 of Profes-



sor Munsterberg's book "Psychology and Crime," from which our account is taken.

6. It would take too long to analyse all the emotions : anger has been described elsewhere and here we shall be content to say something about Modesty and Surprise. There is an offence in the Indian Criminal law known as assault with intent to insult the modesty of a woman, and as it is within the writer's knowledge that very different views are held as to what constitutes this offence, it seems necessary to arrive at some clear idea of what is at the root of this feeling. Speaking of it Professor James says : " Now what may the impulsive root be ? I believe that, for one thing it is shyness, the feeling of dread that unfamiliar persons, as explained above, may inspire withal. Such persons are the original stimuli to our modesty," (a) and he quotes Th. Waitz that " we often find modesty coming in only in the presence of foreigners, especially of clothed Europeans. Only before these do the Indian women in Brazil cover themselves with their girdle, only before these do the women on Timor conceal their bosom. In Australia we find the same thing happening." (b) He then precedes : " But the actions of modesty are quite different from the actions of shyness. They consist of the restraint of certain bodily functions, and of the covering of certain parts ; and why do such particular actions necessarily ensue ? That there may be in the human animal, as such, a ' blind ' and immediate automatic impulse to such restraints and coverings in respect—inspiring presence is a possibility difficult of actual disproof. But it seems more likely from the facts, that the actions of modesty are suggested to us in a roundabout way ; and that, even more than those of cleanliness, they arise from the application in the second instance to ourselves of judgments primarily passed upon our mates." These judgments are traced to the fact that everywhere unusual cynicism and indecency inspire contempt and reserve inspires some respect, and almost every one therefore resolves not to be like such indecent persons, which feeling is sharpened into a real fit of shyness by the presence of some person whom it was important not to displease.

---

(a) James, *op. cit.*, Vol. II, p. 436 and Note.

(b) Th. Waitz, *Anthropologie der Naturvölker*, Vol. I, p. 358.



Modesty, therefore, though in some shape a natural and inevitable feature of human life, need not necessarily be an instinct in the pure and simple excito-motor sense of the term.<sup>(a)</sup>

There is a prevalent view that if force is used to a woman, the offence alluded to above is not committed, but rather if a man takes her gently by the hand because he thereby suggests that she is willing to proceed further with him. If so, a parallel is to be found to this idea in Muller's explanation of the ancient form of capture in marriage, given in his work on the Dorians,<sup>(b)</sup> viz., as indicating the feeling that a young woman "could not surrender her freedom and virgin purity unless compelled by the violence of the stronger sex," a theory rejected somewhat summarily and arbitrarily by McLennan on the ground that savages do not display such delicacy of feeling. Ourselves we are inclined to think that there is much in the view that this was the origin of the idea, and survivals of it are to be found in modern times in cases of elopement or abduction where it is assumed that the woman does not consent: Modesty consists very much, in some instances, in the outward show of resistance.

To apply, however, the notion underlying the passage from Professor James' work, it would seem that it is not so much what the man does, as the man who does it, for it is the fact that the person is unfamiliar that arouses the feeling of shyness which is at the root of Modesty. In addition to this, the desire to stand well with others also alluded to increases the feeling when anything is done or suggestion made in the presence of those who are respected, feared, or even entirely unknown, and so resentment is openly shown as a means of retaining their good opinion rather than as an expression of an outraged instinct.

This amounts to the somewhat cynical conclusion that if the person is well known to the woman and he does not do it in public he is unlikely by his act really to commit the offence in question, and without going so far as to say that this is universally true, we believe it to be correct in a very large number of cases because if it is the circumstances which create the feeling, without the requisite circumstances it will not be found. For we doubt the existence

---

(a) James, *ibid.*, p. 437.

(b) Bk. IV, Ch. IV, sec. 2, quoted in J. F. McLennan's *Primitive Marriage* p. 10, Edn. 1886.

of such a thing as Modesty in the abstract, it seems always to be relative to persons and circumstances of time and place. "Ethnology shows it to have very little backbone of its own, and to follow fashion and example," (a) while some Anthropologists as the result of their investigations deny its existence altogether in some countries. If, however, it may be said to exist in itself, it is probably closely connected with shame, which is an emotion, but is founded on some instinct like the instinct of reproduction which itself is intimately related to the instincts of self-display and self-abusement, and hence is excited by the presence of the male. (b)

It has occurred to us to examine Surprise because of some statements on the subject made by Sir Frederick

Surprise.

Pollock in his work on contracts from which the following quotations are taken. "Another alleged ground of equitable relief against contracts founded on the notion of an inequality between the contracting parties has been, 'surprise' or 'surprise and improvidence.' But this seems to be only a way of describing evidence of fraud or of a relation of dependence between the parties." (c)

"It is submitted, however, that there is no intelligible reason for treating 'surprise' or 'improvidence' as a substantive cause for setting aside contracts much less for attempting to give these words a technical signification. Both terms are in fact merely negative and relative. *Surprise* is nothing else than the want of mature deliberation: *improvidence* is nothing else than the want of that degree of vigilance which a man of ordinary prudence may be expected to use in guarding his own interest . . . . But if it be disputed whether there was or was not any real consent, or whether consent was or not freely given, then circumstances of what is called surprise or improvidence may be very material as evidence bearing on those issues." (d)

"*Surprise and improvidence*, therefore, are matters from which it may be inferred, as a fact in particular cases, that there

(a) James, *op. cit.*, Vol. II, p. 436.

(b) Cf. W. McDougall, *An Introd. to Social Psychology*, pp. 83 & 145.

(c) Pollock on Contracts, p. 633.

(d) *Ibid.*, p. 634.



was no true consent, or that the consent was not free. But it is not to be affirmed as a general proposition of law that haste or imprudence can of itself be a sufficient cause for setting aside a contract, nor even that there is any particular degree of haste or imprudence, from which fundamental error, fraud or undue influence will be invariably presumed.”(a)

Then after quoting a dictum that by Surprise, as a ground for setting aside a deed, is meant surprise accompanied with fraud and circumvention, he cites the law concerning inadequacy of consideration as analogous, and concludes :—‘ Surprise ’ or ‘ improvidence ’ represents nothing but an opinion of the general character of the transaction, founded on a precarious estimate of average human conduct, and cannot well have a greater legal effect than inadequacy of consideration, which generally admits of being determined by reference to the market-value of the object at the date of the contract.(b)

In the first place it must be noted that the author expressly disclaims any technical signification for the word ‘ surprise : ’ it is therefore to be taken in its ordinary sense, and as such is apparently identified by him with ‘ haste,’ if not also with ‘ improvidence,’ and ‘ imprudence ’ is said to be merely a negative term and relative, *i.e.*, as we understand, it has only meaning when used with reference to the conception of deliberation. Now, of course with the aid of such arbitrary identifications and restrictions of meaning it is not difficult to arrive at the conclusion that it cannot itself be a sufficient cause for setting aside a contract : what we desire to maintain is simply that these restrictions are unwarrantable and the identifications are wrong. For whatever ‘ improvidence ’ may be, ‘ surprise ’ is not merely a negative term : neither is it simply an intellectual process, but is mainly, if not entirely, an emotion, and as such is both positive in character and has a disturbing influence on thought. A short psychological description will make clear what its true nature really is. Ribot describes it as spontaneous attention augmented. It is a shock produced by that which is new or unexpected, and belongs to the group

---

(a) Pollock on Contracts, p. 635.

(b) *Ibid.*, p. 636.



of emotions. It is highly probable, he says, that in the state of surprise we have imperfect knowledge because we have too much sensation,(a) an instructive remark as showing that it involves not merely want of knowledge but also some positive cause of this. Professor Sully speaks of surprise as a feeling and one of the first emotions manifested by the child: he regards it as a mental shock or disturbance due to the sudden presentation of something for which attention is not prepared, and calling forth, as a secondary effect or re-action, an intensified attention, and says that it may readily oppose the process of understanding. He further calls attention to its diverting effects(b) which are well described by Professor Stout as a thwarting of attention and arresting of the course of mental activity. It is the initial stage of a mental process, and according as this process is or is not impeded, Surprise is regarded as pleasing or otherwise.(c)

Sir Frederick Pollock, as it appears to us, has not distinguished Surprise from the circumstances which cause it and to which it gives rise, and in any case has missed the fact that it is a feeling which as such disturbs the intellect. That it is necessarily relative to deliberation appears to be an unfounded assumption, want of mature deliberation being merely an effect which sometimes follows it when action is taken. So far as its nature goes, it would seem that, like either fraud or misrepresentation, it may have the effect of perverting the judgment, and, if so, may be a valid reason for setting aside a contract. We do not necessarily maintain that it should be such, but we do assert that the grounds advanced by Sir Frederick Pollock constitute no good reason why it should not.

7. As a mental state Imagination has been distinguished from others in the chapter on Memory, here we desire to insist on its importance. There is, in our opinion, no other quality so valuable for aiding to discover the truth and estimate the probability of evidence, and this is pre-

---

(a) Ribot on Attention, p. 25.

(b) Sully, *op. cit.*, pp. 362-3, 87.

(c) Stout, *An. Psychology*, Vol. II, pp. 275-6.

eminently so when the Judge has to act in a country and among a people so different from his own, as happens when he comes from England to the East.

To illustrate the importance of imagination in general we desire to quote at some length from a well-known writer: "The great majority of uncharitable judgments in the world," says the late Mr. Lecky, "may be traced to a deficiency of imagination. The chief cause of sectarian animosity is the incapacity of most men to conceive hostile systems in the light in which they appear to their adherents, and to enter into the enthusiasm they inspire. The acquisition of this power of intellectual sympathy is a common accompaniment of a large and cultivated mind, and wherever it exists, it assuages the rancour of controversy. The severity of our judgment of criminals is also often excessive, because the imagination finds it more easy to realise an action than a state of mind. Any one can conceive a fit of drunkenness or a deed of violence, but few persons who are by nature very sober or very calm can conceive the natural disposition that predisposes to it. A good man brought up among all the associations of virtue reads of some horrible crime, his imagination exhausts itself in depicting its circumstances and he then estimates the guilt of the criminal, by asking himself "How guilty should I be, were I to perpetrate such an act?" To realise with any adequacy the force of a passion we have never experienced, to conceive a type of character radically different from our own, above all, to form any just appreciation of the lawlessness and obtuseness of moral temperament inevitably generated by a vicious education, requires a power of imagination which is among the rarest of human endowments. Even in judging our own conduct, this feebleness of imagination is shewn, and an old man recalling the foolish actions, but having lost the power of realising the feelings of his youth, may be very unjust to his own past. . . . The further our analysis extends, and the more our realising faculties are cultivated, the more sensible we become of the influence of circumstances both upon character and upon opinions, and of the exaggerations of our first estimates of moral inequalities." (a)

---

(a) E. H. Lecky, *History of European Morals*, Vol. I, pp. 134—136.



Unfortunately, the study of the law is not one that cultivates the imaginative faculty, but is rather opposed to it, for it appeals to the logical faculty which induces a habit of regarding things as generalities and abstractions ; it is the study of the ' humanities ' which has been upheld on the ground that it cultivates imaginative insight into others' thoughts and mental experience generally.(a) The basis of imagination is observation and reproduction, and " productive imagination consists merely in carrying out certain changes or modifications in that reflexion of our sense-experience which is supplied by the reproductive process."(b) It is at once a process of separation or subtraction, and of combination or addition.

Now, it appears to us that the Judge who comes out from Home and never acquires any experience of the people by going among them and speaking with them must necessarily be deficient in the power of imagination, be his natural qualities what they may. This will be so because of his lack of experience, for ' all imaginative activity is limited by experience,' and since production is merely an elaboration of presentative material, there can be no such thing as a perfectly new creation.(c) " The modes of connexion of our experience necessarily reflect themselves in all our imaginative picturings. Thus, it is obvious that all production makes use of those forms of combination which seem inseparable from our experience, *viz.*, the order of space and time . . . . other illustrations of this reflexion of the connexions of our actual sense-experience are seen in our habitual picturing of things as concrete wholes resembling those we know through our senses, of the movements of objects as continuous from one point of space to another and so forth." " There is no production without reproduction. In trying to realise a scene described by a traveller or a poet, I am wholly dependent on the revival of past experiences of my own "(d) " Each individual can only represent to himself the thought, perceptions, emotions, desires, volitions, &c., of his fellows by reference to his own subjective experiences. He must

---

(a) Sully, *Outlines of Psychology*, p. 240.

(b) *Ibid.*, p. 224.

(c) *Ibid.*, p. 225.

(d) *Ibid.*, p. 227.



interpret the manifestations of their mental life by conceptual analysis and reconstruction of the material supplied by his own mental life.”(a) This is true in general: in order, however, to profit fully by experience when dealing with people of another race, he must go further and actually search in his own mental life for analogies which will enable him to construct in imagination the different mental life of those around him. How this may be done has been explained by Professor Stout, (b) who gives us an example of the wide-spread belief among savages in the powers of all kinds of odds and ends to influence the fortunes of the persons possessing them. Now to realise how such a belief will influence their thoughts and actions, the European must reflect on moments in which he has found himself influenced or has felt strongly inclined to be influenced by considerations in themselves as meaningless or irrelevant as those on which the savage relies, *e.g.*, the fall of a picture, the presence of thirteen at a table, the change of seats or cards at the gambling table. He must then attempt to represent a mind in which tendencies, that in him are so overborne by other conditions as to be transient and occasional, are unchecked by opposing forces, and for that reason prominent and permanent. If he can succeed in doing this, actions which would otherwise appear to him extraordinary and motiveless, will be explained and seem natural while if through want of imagination he falls to do it, he will needlessly suspect everything that is told him, and will be forced to account for every event by supposing some deep motive which has not come to light. His conclusion will usually be that he has not got to the bottom of the matter and that it is not safe (in a criminal case) to convict the accused, who will thus be acquitted not because he is believed to be innocent, but because the Judge is unable to account to himself on European principles for the actions of men who are Asiatics.

8. If imagination is the most important quality, prejudice is perhaps the worst impediment. Psychologically speaking, it is a case of mental pre-adaptation which may be voluntary or involun-

Prejudice and  
Observation.

---

(a) Stout, *Groundwork of Psychology*, p. 165.

(b) Stout, *Manual of Psychology*, pp. 21-22.

tary, and is a source of active illusions. "If a wrong mental image," says Professor Sully, "happens to have been formed and vividly entertained, and if the actual impression fits in to a certain extent with this independently-formed preperception, we may have a fusion of the two which exactly simulates the form of a complete percept," *e.g.*, we expect to see a certain person, some one like him comes, and we then err in taking him for the man we expect. Physiologically, owing to a partial identity in the nervous processes involved in the anticipatory image and the impression, the two tend to run one into the other, constituting one continuous process.(a)

The capricious selection of the interpretations we put on objects is limited not only by the character of the impression of the time, but also by the mental habits of the spectator. His fancy runs in certain definite directions and takes certain habitual forms: the whole past mental life and ruling emotions give a particular colour to new impressions and so favour illusion. "There is a 'personal equation' in perception as in belief—an amount of erroneous deviation from the common average view of external things which is the outcome of individual temperament and habits of mind."(b)

For good observation what is chiefly needed is self-restraint, in order to limit the attention to what is actually presented and exclude all irrelevant imaginative activity. The common faults of the bad observer are the impulse to go beyond the facts observed and stray into inference and to look out beforehand for a particular thing and so create a pre-possession. The undisciplined mind is apt to see what it expects, wishes, or, may be fears to see, and to overlook that which it is disinclined to believe.(c) It often happens in consequence that a witness states things which appear to the more educated mind of the Magistrate to be manifestly false or absurd and who is therefore inclined to reject the whole: but such an attitude is more frequently than not a wrong one. An effort should be made to arrive at what the witness actually saw

---

(a) Sully, *Illusions*, p. 94. (b) Sully, *Illusions*, p. 101.

(c) Sully, *Outlines of Psychology*, p. 165.



apart from the explanations he gives of them, for it is usually the tacit explanations which are wrong. Especially is this so if there is any tincture of superstition about the narrative. It is now known that many of the marvellous tales about witchcraft, magic, the evil eye, &c., which were prevalent in England more than a century ago, were really based on facts, but the wrong interpretation of them led to the whole statement being discredited, and it is only on a re-examination of them in the light of later knowledge that we are now able to perceive the substratum of truth which underlay them.

If it be objected that such witnesses must be necessarily false ones because of the untrue explanations which they invent, we cannot admit that they are guilty of anything more than mere mistakes, and these have arisen from the fact that they are dealing with events where the essential conditions have not fallen within their practical experience. When the operative conditions are in the main beyond the control or even beyond the ken of the uncultured mind, ideal construction cannot fix upon what is essential : and since the strength of the practical interests concerned demands the discovery of some operative conditions to form a basis of practical procedure causal efficacy is ascribed to all kinds of circumstances which are in reality totally irrelevant.(a)

Prejudice and Thought.	The extent to which prejudice prevails in observation is readily admitted, but it is not sufficiently recognised that what is true of ordinary perception is similarly true of conception and thought.
---------------------------	--

It is a well known mental law that a state of things is naturally interpreted by help of more common and familiar relations, and so error arises, specially in a strange country. It is particularly the man who comes out late in life from England who is handicapped in this way, inasmuch as his standards are more formed in one direction : as Dr. Carpenter says " our nervous system grows to the modes in which it has been exercised," and the same is true of our mental life. This kind of prejudice is due to Habit, which will be discussed below ; the other aspect is the influence of Feeling on ideas which Professor Höffding explains as follows :—

---

(a) Stout, *Manual of Psychology*, p. 521.



"But the feeling itself may have a hindering effect. If the feeling is very closely intergrown with the idea it will interfere with the natural union between  $a$  and  $a_2, a_3, \dots$  and still more that between  $a$  and  $b$ —that is to say, the line of thought is not brought to its full conclusion, because the feeling will not expand beyond its original object. Here operates the inertia of feelings, which in this way becomes a source of many inconsistencies in history and in daily life . . . . . The fact that a certain idea or set of ideas, has as a basis strong interests or violent emotion alters its relation to other ideas. It becomes a stronger centre of association than it would otherwise be. In all experiences regard is paid only to that which in some way or other affects the idea supported and strengthened by the interest. All the other elements in the world do not exist for consciousness. Feeling effects here a qualitative choice. All ideas which do not harmonize with the ruling feeling are suppressed, just as forms of life disappear which are unable to adapt themselves to their circumstances." (a)

We can trace in many ways the effect of prejudice of this kind which has its basis in feeling. It is commonly remarked that a Judge or Magistrate who is married nearly always takes a more severe view of an offence committed on a woman, which is easily accounted for when we recollect the influence of feeling on ideas and the fact that our feelings practically depend on our interests, which in the case of the married man are centered on woman. For to be impartial truly we require not merely the rare power of vividly representing the affairs of others to ourselves—which depends on the imagination—but also the counter power of abstraction from the vividness with which things known as intimately as our possessions and performances appeal to our imagination. (b) Only so can we see our own affairs in their true light and estimate what concerns ourselves at its true importance, and it is the fact that so few persons possess this power that is the ground of the legal maxim that no man shall be judge of his own case.

---

(a) Höfding, *Outlines of Psychology*, pp. 298-9.

(b) James, *op. cit.*, Vol. I, p. 328.

10. It was said above that one form of prejudice is due to habit, by which remark it was not intended to disparage the utility of habit in many respects, for it is only when habit is without sufficient justification that it becomes prejudice and an obstacle to the reception of new truths. Professor Stout gives as an instance of such prejudice the deeply rooted habit of certain modern biologists, who explain the origin of the characters of living organisms exclusively by natural selection. This mental tendency, he says, has become automatic with them : but in the special occasions in which it comes into play a special exercise of ingenuity is required in bringing the general principle to bear on the particular case.(a)

These words it appears to us might equally well have been written of the legal profession : for it is the habit of the legal mind to try and force legal principles and ideas which have applied to some cases in the past on whatever facts may now arise regardless of whether they fit or not. Through perpetually looking backwards our lawyers have developed a mental tendency which prevents them looking forwards : exclusive regard to precedents and decisions has rendered a certain species of thinking—if thinking it may be called—automatic with them, and the ingenuity which they display in bringing their legal maxims to bear on the particular case only serves to make them the more inaccessible to new ideas. They live in an artificial world of their own apparently oblivious of the fact which, if it were not for the harm it often does to the person and property of individuals, would be as amusing to the outside person as are their attempts to square their decisions with their principles, attempts which remind one of nothing so much as the endeavours of the old mathematicians to square the circle. Nor is this result to be wondered at when they steadfastly refuse to consider as possibly correct any reason which clashes with past views, or even to conceive of any country or circumstances in which their precedents may not apply : the old decisions must therefore be repeated, and the oftener they are repeated the greater the habit must become. “ One necessary and omnipresent con-

---

(a) Stout, *Analytical Psychology*, Vol. I, p. 262.



dition of the formation of habit is the tendency of any mental process with its connected movements to repeat itself simply because it has occurred before—a tendency which grows stronger the more frequently the process recurs. When we say that the tendency grows stronger we mean : (1) that the process is capable of being set in action by a slighter cue, . . . . (2) that it becomes less liable to disturbance from accompanying circumstances, (3) that it becomes stronger as a propensity, *i.e.*, if its course is interrupted or arrested greater impatience is felt. This principle of repetition seems in certain exceptional cases to be of itself sufficient to account for the growth of habit.”(a)

For ourselves we cannot admire the type of intelligence which consists merely in subsuming cases under a limited number of fixed principles nor do we appreciate the legal habit, or, as (b) Best terms it, the legal instinct. We are rather reminded of the words of Darwin “there seems even to exist some relation between a low degree of intelligence and a strong tendency to the formation of fixed, though not inherited habits; for as a sagacious physician remarked to me, persons who are slightly imbecile tend to act in everything by routine or habit; and they are rendered much happier if this is encouraged.”(c) There can be no question that the ordinary judge is rendered much happier if he can find a precedent to quote than if he has to attempt any dialectic of his own, and the aim of most pleaders appears to be to rain down on the judge as many High Court decisions as possible so that the argument often becomes rather a discussion as to the meaning of some precedent twenty years old than a review of what concerns the case under trial.

11. The chief value of habit is that it enables us to do so much mechanically and without thought and so liberates mental power for other things, and it must not be supposed that, because we have laid stress on the mischief it may do, we do not recognise its obvious utility. But we have now to consider a pre-

The continuance  
of character and  
opinions.

a) Stout, *Analytical Psychology*, Vol. I, p. 263.

b) Best on Evidence, § 91.

c) Darwin, *Descent of Man*, Edn., 1891, Vol. I, p. 103.



sumption in law which is in reality based on habit though it is not usually described as such: it is generally presented as an application of the more general presumption that things remain in their original state, an assertion which as we have occasion to remark in the chapter on Insanity, is without foundation.(a) It will be convenient to quote some of the statements of writers on Evidence on the point.

“Various *primâ facie* legal presumptions,” says Taylor, “are founded on the continuance or immutability, for a longer or shorter period, of human affairs which experience tells us usually occurs. For instance, when the existence of a person or personal relation, or a state of things is once proved, the law presumes that the person, relation or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject. It is also presumed, till the contrary appears, that opinions which individuals once entertained and expressed, and that a state of mind on their part once proved to exist, remain unchanged.”(b)

Again Phipson writes “states of persons, mind, or things, at a given time, may in some cases be proved by showing their previous existence in the same state; there being a probability (weakened with remoteness of time) that certain conditions and relationships continue, *e.g.*, human life, marriage, sanity, opinions, title, partnership, official character, domicile.”(c)

As in the case of insanity, Ameer Ali and Woodroffe quote the presumption as follows: “When the existence of a personal relation or state of things continuous *in its nature* is once established by proof, the law presumes that such status continues to exist as before, etc.”: here as there, we ask, where is the presumption? The addition of the words ‘continuous in its nature’ makes it a mere tautology: if that be known, the same thing is simply affirmed again, and there is no inference or presumption drawn.

However what we are now chiefly concerned with is the narrower application of this wide presumption to character and opinions.

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 711

(b) Taylor on Evidence, §§ 196, 197.

(c) Phipson, Evidence, 48, 2nd Ed., 96.

The same authors say "the character and habits of a person are presumed to continue as proved to be at a time past. So, in an American case (*Sleeper v. Van Middlesworth*, 4 Denio, 431 Amer.), it was attempted to impeach the character of *P*, a witness. *A* and *B* who knew *P* four years before when he resided at another place testify that his character was then bad. It was held that the presumption was that *P*'s character remained the same."<sup>(a)</sup> What we desire to point out is that the mental law is one of change and not of continuance, and that it is a mistake therefore to attempt to apply such a presumption here. We are compelled to attribute continuity, to a certain limited extent, to the physical sequences of nature because they have no purpose in view that we can understand, and in order to render our world intelligible to us, but not because there is anything in their existence *per se* that warrants the presumption. In the sphere of men's opinions and character there is no such necessity, for they are equally intelligible on the assumption that they change from time to time: indeed there is nothing that a man changes more easily than his opinions. If there is any validity in the presumption that, because a man held certain opinions or was of a certain character four years ago, he does so now or is now of the same character, it is due not to continuance but to repetition, that is habit. It is because the opinions have been reinforced by frequently thinking in the same way and a mental disposition has thus been formed that we find them now, not the same, but of the same kind only stronger and more fixed, for that is the legitimate conclusion. When, however, a man's habitual disposition is spoken of, it must, as Mr. Bradley says,<sup>(b)</sup> be taken to include his environment as well as his internal feelings, etc., you cannot separate him from his surroundings and assume they have no influence on him nor can you truly say that if the surroundings change, the individual will remain the same. But how rarely is it that the environment does not alter.

Again, a man is influenced consciously or unconsciously by his past, which is not a constant quantity but ever changes. It is

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 713.

(b) Bradley, *Appearance and Reality*, pp. 78-9.



perhaps truer of morality than of intellectual opinions that persons remain the same, for we know cases of men who, owing to their morality by force of their habitual conduct act against what are their real opinions ; but here also, as in the sphere of opinions, so much depends on age, surrounding circumstances, change of circumstances and the like, that the value of the presumption appears to be so slight as hardly to be worth the quoting. That character remains the same would seem to be truer of some races than others : among the Burmans it is notorious that a man may be good one year and bad the next to an extent which one hardly experiences in European countries. This is doubtless only one of the results of different education and surroundings and serves to show how little they can be neglected in estimation of character and its changes. For the character depends on the habituated self and the conditions we meet with, and as neither does this self cover our whole nature nor can we exhaust all the conditions with which we may meet, there is always the possibility of a change in character and some fresh act. It is only part of the facts which is covered by 'same character and stimulus, same act.' The self no doubt, especially as we grow older, becomes more and more determined and so tends to exclude more possibilities, and external conditions may become more or less permanent : but this is not enough. This fixedness is only relative, because we cannot exhaust all possible external conditions and we can never systematize the whole self.(a)

12. It is enacted in s. 55 of the Indian Evidence Act that  
Evidence of  
character. 'character' includes both reputation and disposition, but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown. In English law, however, character is confined to reputation only, and by reputation is meant what is thought of a person by others and is constituted by public opinion : at least this was the decision in *R. v. Rowton*, though the case is said not to be acted on in practice.(b) Best gives the effect of the case as

---

(a) Bradley, *Ethical Studies*, pp. 48, 50.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 435.



follows:—"The enquiry should be as to his *general* character among those who have known him, with a view of showing that his *general* reputation for honesty is such as to render unlikely the conduct imputed to him, and even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused is inadmissible." (a)

The legal use of the term 'character' evidently differs considerably from the ordinary acceptation at all events in English law, for not only is it regarded as equivalent to reputation, but it was also said in the case of *R. v. Wood*, "the question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." (b) The Indian legislature have come nearer to the popular meaning by including disposition, which is evidently a step in the right direction if only for the reason given by Sir James Stephen that "the question always put to a witness to character is, what is the prisoner's character for honesty, morality, or humanity? as the case may be" . . . and "it would be no easy matter to make the common run of witnesses understand the distinction between reputation and character." (c) "Disposition," it is said, "comprehends the spring of motives and actions, is permanent and settled, and respects the whole frame and texture of the mind. When a man swears that another has a good character in this sense he gives the result of his own personal experience and observation, or his own individual opinion of the prisoner's character as is done by a master who is asked by another for the character of his servant." (d)

We do not desire to refine too much over psychological terms, but we must remark that this description of disposition appear to us to include too much: disposition is what we have referred to above as the self and should not be said to comprehend in itself the springs and motives of action to the entire exclusion of the en-

---

(a) Best on Evidence, § 260.]

(b) *Ibid.*, § 261.

(c) Stephen, Digest of the Law of Evidence, p. 187.

(d) Ameer Ali and Woodroffe, *op. cit.*, p. 435.

vironment which supplies the stimulus that acts on the self. We have explained that it is partly because we cannot exhaust all the external conditions under which a man may have to act that we cannot speak with certainty as to his character remaining the same. The commentators then proceed to say that there are therefore two different questions which can be asked, *viz.*, what was the general reputation of the accused for honesty ? and, was the accused generally of an honest disposition ? and the witness will answer the first from what was generally known about the accused in the neighbourhood where he lived, and the second from his own special knowledge of the accused. But in either case evidence may be given only of *general* reputation and *general* disposition. "Both lie in the general habit of the man rather than in particular acts or manifestations....Where evidence of character is offered, it must be confined to general character ; evidence of particular acts, as of honesty, benevolence or the like are not receivable."(a)

There appears to us to be something unsatisfactory about this evidence of character, which in reality springs from a confusion between speaking generally or giving general evidence and giving evidence as to a general matter as distinguished from a particular fact. When a witness speaks to reputation, disguise it by what terminology you will, he is speaking merely to rumour ; he is neither stating what he has himself seen or heard nor yet necessarily giving his own inference from any facts, he may be merely repeating the inferences of others from he knows not what facts, if indeed they are based on any facts. This has already been remarked on by Mr. Mayne : "A witness to character who begins, as he always does begin, by giving his own opinion, is stopped, and told that he must only say what character the accused bore among those who were acquainted with him generally. The curious result follows that a witness is not allowed to describe a man's character from his own personal knowledge and experience, but is required to say what people

Reasons for the unsatisfactory nature of character evidence.

---

(a) Ameer Ali and Woodroffe, *op. cit.*, pp. 435-6.

in general think of him, of which he can know little or nothing.”(a) Further when it is said that this evidence must be as to *general* reputation, we must confess that we do not know how such evidence can be given. As Sir James Stephen says (*vide supra*), the question asked must be, what is the prisoner’s character for honesty, morality or humanity ? as the case may be : that is to say, you must define your question in some respects just as in comparison you must compare two persons or things in respect of some one quality. To say that a man is good or bad simply does not meet the case : good and bad are relative terms and are indefinite and must be defined for the purpose of the case in hand, and this the commentators themselves seem to admit when they frame the question, ‘ what was the general reputation of the accused *for honesty* ’ ? The last two words in part specialize the case. We must submit, however, that the question cannot be satisfactorily answered by repeating ‘ what was generally known about the accused in the neighbourhood where he lived,’ unless by the words ‘ what was generally known ’ you are allowed to state particular facts, and then you will merely be stating facts on hearsay, at all events in most cases.

Now, as regards general disposition the same objection does not apply, because here the witness is allowed to speak ‘ from his own special knowledge of the accused.’ This to our mind is the only legitimate kind of evidence as to character. It is true that it is said that evidence of particular acts, as of honesty, benevolence or the like are not receivable, which is, in our opinion, a mistake : it is objected that most villains could prove some occasion on which they have acted with humanity, fairness or honour, but why should they not have the credit of this and their character be estimated according to the balance of their actions proved ? However, we do not desire to delay over this : a witness’s general impression of a man is founded on his own observations, it has a basis of fact, and is a definite matter. In the section on comparison of handwriting we have quoted a passage in which Professor James well describes how such a general impression is created as the impulsive results of a summation of stimuli : reasons

---

(a) J. D. Mayne, Criminal Law of India, 3rd Ed., pp. 1016-7.



are not given for it, but it is felt, and it cannot be analysed and remain the same.(a) This is the real objection to expecting a witness to give definite instances on which it is founded, but, if he can do so, we think he should be allowed, and we do not see how otherwise there is any way of testing the statement of a malevolent witness. This kind of evidence is a very different thing from speaking generally, though it does speak to a general or total result.

---

(a) James, *op. cit.*, Vol. II, pp. 350-1, Note.

## CHAPTER XI

### INSANITY.

General features of insanity—interpretation of insanity in the Indian Criminal law—separation of the cognitive faculties from the emotions and the will—such separation fallacious and opposed to the true inter-connection of psychical states—preponderating influence of the emotions in the total state of consciousness—Delusions as a mark of madness—their explanation—argument from the nature of experience—recapitulation. Insane impulses—the medical and psychological view of the existence of such impulses—Mr. J. D. Mayne's view of insanity—Criticism of it—the burden of proof in cases of insanity—analogy drawn from hypnotic patients.

The importance of insanity in law is manifold : it raises the question whether a criminal is to be held responsible or not for some lawless act, whether a witness is competent to give evidence, whether a party is qualified to contract, whether a partnership or agency is terminated, and other similar points. As it is usual to go to mental pathology for assistance in the matter and to call in medical men as expert witnesses, it may be doubted at first whether it is any concern of psychology : but the psychologist knows otherwise, for he has gained some of his most important results by a study of abnormal states of mind, one of which, *viz.*, the hypnotic has been left very largely to him. Such treatment of the subject however as we shall give will not be found to trespass much on the province of medicine, both because we are unqualified for such a task and because psychology is naturally inclined to confine itself as far as possible to the psychical standpoint though this may sometimes include an appeal to physiology.

At the outset some general features of insanity will be noted.

General features of insanity.	“The effect of mental disease is in general to substitute for the complex balanced system of psychical forces which we have in health, a comparatively simple state of things in which certain tendencies grow abnormally strong and predominant through the suppression of others. More particularly, the higher and later
----------------------------------	---

acquired forms of psychosis, regulative processes of ideation and self-control generally, tend to be dissolved, leaving the earlier and more instinctive tendencies uncontrolled. Thus through the weakening of the regulative volitional factor the patient is unable to control his ideas, and his intelligence is wrecked : or he becomes a prey to unregulated emotion, as where overweening conceit, timidity or animosity becomes predominant, and helps to maintain corresponding mental illusion.”(a)

We draw attention to the fact, for reasons that will appear later, that stress is here laid on the weakening of the volitional factor, and this feature again appears as the explanation of the crowd of associations of ideas which run riot in the insane mind. “If there is any single criterion of mental derangement,” says Wundt, “it is this—that logical thought and the voluntary activity of the constructive imagination give way to the incoherent play of multifarious associations.” He attributes the purposeless vacillation of the insane and the manner in which they express their thoughts to a lack of voluntary control over the unruly associations, and says that it is in this very mobility of association that the germ of decay is to be looked for.

Another feature is the defective concentration of the attention which arises from the liability of the intellectual processes to be continually interrupted by sudden associations.(b) It is because the acts of the insane are regarded as to some extent involuntary that the doer is not held responsible for them, that is to say, the basis of responsibility is voluntary action. Hence Mr. Bradley’s pertinent observation on Dr. Maudsley’s book ‘Responsibility in mental disease’: “How in the world is it possible to say what relieves a madman of responsibility unless you know what makes a sane man responsible? Unless a man is agreed with us as to our main beliefs as to a sane man’s responsibility, how can we receive his evidence as to any one’s non-responsibility?”(c)

The conception of responsibility will be found fully analysed in a later chapter : here we confine ourselves to discussing one side of the legal aspect of it, *viz.*, that connected with insanity.

---

(a) Sully, *Outlines of Psychology*, p. 468.

(b) Wundt, *Human and Animal Psychology*, pp. 317—321.

(c) F. H. Bradley, *Ethical Studies*, p. 44, note 1.



2. It is stated in s. 84 of the Indian Penal Code that “ nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.”

Interpretation of  
meaning of insanity  
in the Indian criminal law.

We desire to quote an instance of the way in which this has been interpreted by an Indian High Court. In the case of *Queen-Empress v. Kader Nasyer Shah*, I. L. R., 23 Cal., 604, on p. 608 will be found the following expression of the judges' view:—

“ We learn, however, from medical and legal authorities” (here they quote three authorities) “ who have considered the subject of responsibility in *mental* disease that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties, because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses, or to use the words of Lord Justice Bramwell in *Reg. v. Humphreys* . . . ‘ to guard against mischievous propensities and homicidal impulses.’ Whether this is the proper view to take of the matter, or whether the exemption ought to be extended as well to the cases in which insanity affects the emotions and the will as to those in which it affects the cognitive faculties, is a question which it is not for us here to consider. There are no doubt eminent authorities who are in favour of extending the exemption to those cases, but our duty is to administer the law as we find it. It might be said of our law as it has been said of the law of England by Sir J. Stephen . . . that even as it stands the law extends the exemption as well to cases where insanity affects the offender's will and emotions as to those where it affects his cognitive faculties, because where

the will and emotions are affected by the offender being subjected to insane impulses, it is difficult to say that his cognitive faculties are not affected. In extreme cases that may be true ; but we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. To take such a view as this would be to go against the plain language of s. 84 of the Indian Penal Code and the received interpretation of that section."

In both this case and also that of *Queen-Empress v. Lakshman Dagdu*(a) the judges found the accused guilty of murder and sentenced him to transportation for life, and then sent the cases to the Local Government with a recommendation that the Government be moved to take them into consideration and grant reduction of sentence or pardon. In the Calcutta case they added that the accused was suffering from mental derangement of some sort and was therefore entitled to every indulgent consideration.

We cannot ourselves either sympathise with or in fact understand the attitude of mind of the person who at the same time says ' guilty ' and ' let him off. ' It appears to us to be merely an indication of the fact that the judges in question really believed their interpretation of the law on the point of insanity to be one that was not in accord with the facts : in other words that it pronounced a man not to be of unsound mind who was in fact insane. From their course of action alone it would seem to be clear that either the law needs amendment or that the judges' interpretation of it was wrong, and the fact that it was the received interpretation of it does not in the least prove it to have been correct. With the progress of knowledge it is necessary to revise our conclusions from time to time, and this is eminently a case in which the psychologist and the physician are ahead of the lawyer, and the lawyer himself is beginning to suspect it, as was shown by the halting language of these judges though they nevertheless obstinately adhered to their own traditions.

---

(a) L. L. R., 10 Bom., 512.



The above two cases are cited, apparently with approval, by Dr. H. S. Gour(a) who expounds the criminal law in India as follows :—“ The use of the word ‘ knowing ’ (*i.e.* in § 84) is significant and implies that in order to exempt a person from criminal responsibility, insanity must have affected his cognitive faculties. If it merely affected his emotion, or will, leaving his cognition substantially unimpaired he cannot plead exemption, though it may be a case of extenuation(b) ” and again :—“ The two-fold test (*i.e.* as given in § 84), therefore, follows the two fold functions of human mind, namely reason and emotion. The function of the former or the faculty of thought is performed in cognition, perception or judgment, of the latter in moral sentiments and affections, the propensities and the passions. *These two functions belong to different compartments of the mind, and one may be diseased while the other is normal. The clauses, it will be seen, relate solely to the domain of reason, they exclude all cases of emotion.*”(c) He also adds that the Code in laying down its two tests follows the current of English cases. Yet again he remarks :—“ In this form of insanity (puerperal mania) the will power is then affected. But insanity affecting the emotions and the will is not entitled to exceptional treatment.”(d) He further draws up a list of appropriate questions to be put to a medical witness in cases of suspected insanity, of which No. 4 runs as follows :—“ Do you consider him to be of ‘ unsound mind,’ in other words *intellectually* insane ?”(e)

Throughout his treatment of the subject he takes up the position that insanity is considered from a different standpoint by the medical man and the jurist, and that for law there must either be delusions or incapacity to distinguish between right and wrong to constitute insanity.(f) He appears to see nothing anomalous or erroneous in the law adopting such an attitude and defining insanity as it likes, without reference to the medical and psychological facts.

---

(a) The Penal Law of India, Edn. 1909, pp. 329-39.

(b) *Ib.*, p. 318.

(c) *Ib.*, p. 320.

(d) *Ib.*, p. 325.

(e) *Ib.*, p. 339.

(f) *Ib.*, pp. 318, 331, 339.



3. Our purpose is to show that this separation of the so-called cognitive faculties from the emotions and the will, and the consequent assumption that the one can be affected without influencing the other is opposed to the conclusions of psychology, biology and metaphysics.

Separation of  
cognitive faculties  
from the emotions  
and the will.

The fallacy into which the judges have fallen is well known to the psychologist under the title of 'Faculty-Psychology,' and it will be necessary to show briefly what this is. It is quite legitimate for the purposes of classification or clearness of treatment to divide up the mind or consciousness into different processes, such as cognition, emotion, will, etc.; but it is entirely erroneous to postulate certain entities corresponding to these processes and regard them as existing apart from one another and acting in different manners on different parts of the body or mind, or as each producing certain manifestations.

When for example the judges speak of "the cognitive faculties of the mind which guide our actions, our emotions which prompt our actions, and the will by which our actions are performed," they are both making a division of consciousness which is psychologically untrue and also are attempting to explain knowledge, emotions and will by causes which do not exist.

Knowledge is not an effect or resulting product of cognitive faculties, neither are emotions the result of a feeling faculty nor yet are volitions produced by a faculty called will. To assign such explanations is merely to assert the same thing over again in different words. "To say," says Prof. Stout, "that an individual mind possesses a certain faculty is merely to say that it is capable of certain states or processes. To assign the faculty as a cause, or as a real condition of the states or processes, is evidently to explain in a circle, or in other words it is a mere failure to explain at all. Thus, it is futile to say that a particular voluntary decision is due to will as a faculty. . . . We explain nothing, by asserting that certain mental processes in man have their source in the faculty of Reason," etc.(a) Similarly Prof. Alexander speaks of our inveterate habit of imagining that

---

(a) Stout, *Manual of Psychology*, pp. 114-15.

there is such a thing as will in general. "We think of will as a kind of fixed machinery and on the other side of certain objects supplied to it, and we imagine the will as taking up its objects in turn. But will is nothing but a common name given to certain modes called volition in which the mind behaves under certain circumstances and every volition is distinguished from every other by the nature of its object." (a) In like manner Wundt condemns the abstract concept of a will which is transcendental and absolutely distinct from actual psychical volitions. (b)

The reader may think perhaps that this is merely a question of verbal expression, but we assure him it is not so. In the case before us it is clear that the belief held by the judges that there are such things as cognitive faculties which are the causes of knowledge, led them to the conclusion that, if these were unimpaired, the accused must have a mental capacity for knowing the nature of his act. A truer view of the inter-connection of mental processes and of the unity of consciousness would have saved them from such errors, as will now be demonstrated.

The total state of consciousness at any moment combines usually, if not always, several ways in which  
 The inter-connection of psychical states. we are related to an object: we are aware of it (knowing), we are pleased or displeased with it (feeling) and we experience a tendency to alter or transform it by bringing it more fully into consciousness or the reverse (conation). These states are not distinct ones but partial constituents of one whole. Through the conative process we come to discover the nature of the object and thus conation and cognition are essentially connected: they are in fact different aspects of one and the same process. Cognition gives it its determinate character but without conation there would be no process at all to have a character. (c)

To exhibit the same inter-relation in different language: people speak of the ego, the self, the personality, etc., which are terms primarily intended to express the inter-connection of all

(a) S. Alexander, *Moral Order and Progress*, p. 39.

(b) Wundt., *Outlines of Psychology*, p. 205.

(c) See Stout, *op. cit.*, pp. 57 *et seq.*, 599.



psychical experiences of the individual. Now if we ask of what this personality consists, we find that it is an aggregate in part of the states and actions that constitute in each of us the feeling of the body and the routine of life, and in part of sensations, ideas, images, memory, instincts, tendencies, desires representing the habitual medium in which we live. But these are organised states, solidly connected and mutually awakening one another. We then go on to ask what is the bond that connects them? and the answer is, the organism: it is this which binds one state of consciousness with another, though what reaches consciousness is little compared with what lies buried below, albeit still active.

Nevertheless both the feelings, desires, passions as well as the highest intellectual manifestations have their roots in the organism.(a)

4. Let us now consider which of these psychical elements has the preponderating influence in the constitution of the personality, in order that we may see whether there are grounds for the belief, that the question whether a man is *compos sui* or not depends on his cognitive processes and is not connected with the state of his feelings and volition.

“Ideas,” says Ribot, “are a secondary factor only in the constitutions and alterations of the personality. The idea plays its part, but it is not a preponderating one. These results are in accord with what psychology has long taught, namely that ideas have an objective character. Hence they cannot express the individual as his desires, sentiments and passions do.”(b)

Again Wundt writes:—“In the combinations of ideas and feelings which we call motives, the final weight of importance in preparing for the act of will belongs to the feelings, that is the impelling feelings rather than to the ideas. This follows from the very fact that feelings are integral components of the volitional process itself, while the ideas are of influence only indirectly through their connection with the feelings. The assumption that a volition may arise from pure intellectual considerations, or that a

---

(a) Ribot, *Diseases of Personality*, pp. 51, 68, 82, etc.

(b) Ribot, *op. cit.*, pp. 124-5.



decision may appear which is opposed to the inclinations expressed in the feelings, is a psychological contradiction in itself.”(a)

We call attention to this last sentence for it appears to us that the assumption condemned here is just the one made by the judges in the case referred to above, that is to say, they assume that though the emotions or the will may be affected it is still possible for a decision to appear opposed to such inclination, in virtue of the fact that the cognitive faculties are still unimpaired, or in other words, from pure intellectual considerations. This assumption which is their ground for holding the man to be responsible for his act is thus declared by Wundt to be a psychological contradiction in itself and he further adds that it springs from the false assumption of the existence of a will distinct from actual psychical volitions.

And again : “ intellectual processes can indeed never do away with emotions : such processes are, on the contrary, in many cases the sources of new and characteristic emotions . . . . still intellectual development exercises beyond a doubt a moderating influence on emotions.”(b)

We would also refer to our remarks elsewhere in this volume on the influence of emotion on the intellect and to the fact demonstrated by Ribot that a change in the sexual instincts or in the tendencies connected with nutrition, &c., will change the personality.(c) These tendencies depend directly on the organism and the emotional states are reducible to tendencies ; the conclusion therefore is, that, so far from it being immaterial to the question of insanity whether the emotions or the will have been affected or not, there is more reason to suppose that an alteration or perversion of them would change the personality than that a destruction of the intellectual processes alone would have that result, inasmuch as the latter are not so immediately related to the basis of the personality itself. We have no doubt that such is really the case and that what are commonly known as derangements of the intellect are in fact based on and explicable as due to perversion

---

(a) Wundt., *op. cit.*, pp. 204-5.

(b) *Ibid.*, p. 209.

(c) Ribot, *op. cit.*, pp. 61 *et seq.* ; Psychology of Attention, p. 108 *et seq.*

of the emotions, and an argument to this effect will shortly be drawn from a consideration of the nature of experience itself.

5. Before, however, proceeding to consider the matter from the side of metaphysics we shall seek some further psychological testimony to the dependence of intellectual disturbances on emotional ones.

**Delusions as a mark  
of madness.**

It is not necessary to establish the existence of a delusion in order to prove that a man is insane, but it is very commonly considered that this is a mark of madness and intellectual aberration. Now such delusions depend on a profound change in the nature of personal experience, which makes the present discontinuous with the past, and these breaches of continuity are frequently due to nervous disorders. "In general," says Prof. Stout, "a change in the experiences connected with the body, and especially with organic sensation, seems to be an essential factor in the process. Sometimes the resulting illusion relates specially to the bodily self, and does not profoundly affect the continuity of personal existence in other respects. Thus a patient, whose bodily sensations have become abnormal, will feel as if he were made of glass or butter, and come to suppose that he actually is composed of such materials. But when the illusion is not limited to the bodily self, but involves a transformation of the individual's whole idea of his life-history, the reason probably lies in profound alteration of emotional tone. Organic sensation is a highly important factor in emotional states; alteration in it may either produce or be attended by a general change of emotional attitude. But emotions are not merely specific modes of feeling; they also involve characteristic conative tendencies either in the way of expansive and aggressive activity, or of shrinking and aversion . . . they fasten on any object they can find. When they have not an object, they make one for themselves . . . . If the emotional moods due to pathological conditions are sufficiently profound, intense, and persistent, whole systems of ideas will arise in this way which may be quite discontinuous and discordant with the actual past experience of the subject."(a)

---

(a) Stout, *op. cit.*, pp. 550-1.



The writer then points out that emotional moods in human life commonly arise in connection with social situations, and so when they arise pathologically, the patient explains them by ideally representing corresponding relations between himself and his social environment. Thus come delusions, such as that he is being persecuted, or has committed some great sin, if the emotional moods are in the nature of depression, or that he has boundless wealth or power, etc., if they are in the nature of exaltation.

Thus the existence of delusions is traced to ideal representations which the insane are forced to make in order to explain to themselves changes in their emotions, and such so-called derangements of the intellect would never have arisen at all but for some prior emotional affection. If space allowed, we could similarly illustrate how in the case of all illusions, and as believed by most psychologists to a lesser degree in the case of hallucinations, the explanation is always to be sought in some disturbance of the organic sensations and the reasons which the patient invents to himself to account for them.

Prof. Störöing accounts for most forms of madness by morbid affective conditions. To these he attributes fixed ideas, delusions in paranoia, melancholia and mania, and he regards them as the determining, or at any rate contributing factors in general paralysis of the insane. The manner in which affective phenomena beget the insane judgments involved in ideas of persecution (in paranoia), notwithstanding that intelligence in general remains intact, he explains as follows. The affective anomaly biases the course of reproduction of ideas because affective states determine the train of ideas not only quantitatively, by increasing or retarding its speed, but qualitatively as well. They determine or help to determine the content of the ideas reproduced. They have a direct influence on the course of ideation, not mediated by the ideas which gave them origin. The effect of feelings varies with their specific character, the tendency being towards the reproduction of ideas or ideal complexes which have previously gone with a similar or identical affective state. Thus a mood of morbid suspicion is sure to tend towards reproduction of ideas which are themselves accom-

How affective  
anomalies produce  
insane judgment.



panied by feelings of a suspicious or unpleasant nature. They also lead to bias in fixation because ideas of a similar affective tone are most readily fixed, as such ideas find in that affective attitude stronger associational attachments than ideas of a different affective character.

The affective anomaly thus giving a definite bias to the processes of reproducing and fixing ideas, so that the presentation of the facts harmonises with the prevailing mood, it is evident that the resulting judgment must be false, and in such a way that the idea of the facts as accepted in the judgment will be accompanied by an emotion of suspicion, although the actual facts give no ground for suspicion.

He adds that modification of perceptions is also a result of the affective anomaly and influences judgment similarly, while it is the abnormal intensity of the affective conditions which accounts for the consciousness of the validity of the false judgment.(a)

It is surely, in the face of such facts, ridiculous to set up a separation between the cognitive faculties on the one side and the emotions and the will on the other, and affect to discover cases in which only the former or only the latter have been impaired. The essential inter-connection of these mental states, as illustrated by the results referred to above, makes it impossible that such a theory can be true. The more correct doctrine is summarized by Wundt, when pointing out the main psychical conditions for abnormal states, as follows :—" We may distinguish in general three kinds of such conditions. They may consist (1) in the abnormal character of the psychical *elements*, (2) in abnormalities in the way in which psychical *compounds* are constituted, and (3) in abnormalities in the way in which psychical compounds are *combined*. As a result of the intimate inter-connection of these different kinds of conditions it hardly ever happens that one of these three conditions is operative alone ; all three usually unite. The abnormal character of the elements results in abnormalities of the compounds, and this in turn brings about changes in the general inter-connection of conscious processes."(b)

---

(a) G. Störing, *Mental Pathology and Normal Psychology*, Translation Loveday, pp. 223-5, 235, 240, 259.

(b) Wundt, *op. cit.*, p. 298.

By 'psychical elements' it may be explained, Wundt refers to sensations and simple feelings, and by 'psychical compounds' the combination into which these enter, including ideas, memories, composite feelings, emotions, volitions and the larger complexes in which these unite.

Likewise Prof. Sully says that, though the pathologist may distinguish forms of mental disturbance that have their primary source in a perversion of feeling or of the intellectual functions, there is no such thing as an isolated disturbance of any one of the three functions. All mental disorder implicates mind as a whole, though it may show itself as more particularly a derangement of intellect, of the feelings, or of the volitional factor.(a)

6. We now propose to exhibit briefly this same inter-connection from the side of metaphysics.

Argument from the nature of experience. "The function of the 'understanding' is the perception of agreements and differences and other derived logical relations between contents of experience."(b) The 'understanding' therefore, or, as the judges call it, 'the cognitive faculties' are concerned with 'experience,' and a short examination of the nature of the latter will be found to lead by another path to a conclusion similar to the psychological one.

"Experience," writes Dr. Ward, "cannot without mutilation be resolved into three departments, one cognitive or theoretical, one emotional and one practical. . . It is true that what we take and what we find we must take and find as it is given. But, on the other hand, it is also true that we do not take—or at least do not take up—what is uninteresting; nor do we find unless we seek, nor seek unless we find. . . . Regarding experience in this wise, as life, self-conservation, self-realisation, and taking *conation*, *not cognition as its central feature*, we must conclude, that it is not that 'content' of objects, which the subject cannot alter, that gives them their place in its experience, but their worth positive or negative, their goodness or badness as ends or means to life."(c)

---

(a) Sully, *The Human Mind*, Vol. II, pp. 74 & 322.

(b) Wundt, *op. cit.*, p. 294.

(c) J. Ward, *Naturalism and Agnosticism*, Vol. II, p. 133.

And again the same author tells us that objects of experience are not primarily objects of knowledge, but objects of conation, *i.e.*, of appetite and aversion; that thinking is doing, and like all doing has a motive and an end, and that, however, much for purposes of exposition we may abstract, we cannot separate intellection from volition.(a)

This view has been still further developed by a school of thinkers who have come into prominence, and to whom we have already had occasion to refer, *viz.*, the Pragmatists or Humanists. They hold that the concrete processes of thought as they occur in individual minds are indissolubly mixed up with feelings and emotions, desires and volitions, and that 'true' and 'real' are terms of value which have meaning only to a thought guided by purposes, interests, and ends. A single quotation from one of these writers, will suffice. "Pure intellection is not a fact in nature; it is a logical fiction which will not really answer even for the purposes of technical logic. In reality our knowing is driven and *guided* at every step by our subjective interests and preferences, our desires, our needs and our ends. These form the motive powers also of our intellectual life."(b)

Now this view of experience and knowledge seems to us to hit exactly the case of the man described in the words of the Indian Penal Code as 'incapable of knowing the nature of the act or that he is doing what is wrong.'

For if it is the goodness or badness of objects as ends to life that gives them their place in experience and they are primarily objects of appetite and aversion not of knowledge; and if our knowing is guided at every step by our preferences, our desires, and our needs, then it is clear that the nature of the act will appear to the doer in the light in which his desires and needs present it, and that that only will be 'wrong' for him which runs counter to such desires and ends. These latter depend on the emotions and the will, and therefore a perversion of these due to organic disease or other cause must entail a similar perversion of the intellect, *i.e.*, of the knowledge of right and wrong. Indeed this must be so

---

(a) J. Ward, *ibid.*, pp. 131, 189, 235.

(b) F. C. S. Schiller, *Humanism*, p. 10.



when it is remembered that all morality is relative, and that right and wrong are terms that have a meaning only with reference to ends: there is no fixed standard of right and wrong of which all must have the knowledge, and it is idle to argue as if there were one. The law no doubt does its best to create one by prohibiting certain acts under certain penalties, but apart from the fact that the law is often unable to maintain that standard and departs from it either openly or tacitly by way of mitigation of penalties, such success as it actually does have is mainly due to its assumption that every one knows the law, an assumption which is of course in reality very frequently false in individual cases.

Such an assumption would not be tolerated even for legal purposes if it were not that the legally wrong does in fact usually correspond to what most men hold to be morally wrong, and so it is natural that the standard of unsoundness of mind adopted in the Penal Code should refer to what is 'either wrong or contrary to law:' for by 'wrong,' as we have elsewhere shown, 'morally wrong' is here intended, and not merely what is wrong as forbidden by law.(a)

7. Let us now briefly gather up the results  
Recapitulation. of this discussion.

There are no such things as cognitive faculties existing apart from the emotions and the will, nor can our cognitive processes be separated off from our emotional and volitional ones, except for the purposes of study and exposition.

These mental states are inter-connected and occur together in one total state of consciousness, and states of consciousness are bound together by the existence of the organism. All ultimately depend on that, but the emotional states do so more directly than the intellectual ones, and it is our emotions which have the preponderating influence in the whole psychical complex which represents the mind at any time. They guide the intellect and direct it, and the latter cannot make decisions in opposition to them on purely intellectual grounds. It follows from this that the emotions and the will cannot be affected without also affecting our cognition, and delusions, illusions, etc., and what are

---

(a) See Chap. XV, para. 3.

generally known as derangements of the intellect can be traced to, and in fact explained as, the products of perversion of the emotions and affection of the organic sensations. To refuse therefore to recognise<sup>z</sup> affections of the emotions and the will as sufficient ground for allowing the benefit of the exemption contained in s. 84 of the Indian Penal Code is an unjustifiable restriction of that section, which is based on a false assumption of popular psychology and is entirely opposed to the truth of the case.

8. From what has preceded, the reader will have no doubt as to what our attitude is likely to be on the **Insane impulses.** vexed question of 'insane impulses.' In the case cited above the judges held that a person is not entitled to exemption from criminal liability when it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. Sir James Stephen is of opinion that according to English law 'insane impulses' may be a sufficient defence, but Mr. J. D. Mayne dissents from this and clearly holds the view that both in the English and Indian Criminal law uncontrollable impulses are not recognised as proving madness in the sense the law requires.<sup>(a)</sup> It appears to us that there are two ways of treating this question. The first is the one usually adopted, *viz.*, to argue as to the existence of such impulses, and as to the possibility of proving that they are really uncontrollable.

The second is based entirely on the considerations already set out in this chapter and relates really to the burden of proof in the matter. Briefly summed up, we may say, that as, for the reasons already given, the close inter-connection of the cognitive, emotional and volitional processes is established, if the affection of any one of them is proved it ought to be presumed that the others are also affected until those who assert the contrary prove their view to be correct.

As we have some remarks to make on both methods we shall devote some space to each.

---

(a) J. D. Mayne, Indian Criminal Law, 3rd Edn., pp. 410 *et seq.*

Now in the first place it seems to us that if it is really accepted that there are such things as impulses which are truly uncontrollable then whatever may be the language or the intention of the law, the person who maintains that such a case is not a sufficient defence for a man charged with a crime, must simply be regarded as inhuman. In a barbarous state he might doubtless persuade the society in which he lived that it was demanded by their own interests that a person afflicted with such impulses should be executed or punished for them, but he would convince no civilised people that they were justified in adopting such a penal code. At the most they would hold that such persons ought to be kept under restraint. To whom then should the question naturally be addressed whether there are such things as ‘uncontrollable impulses?’

We should reply ‘To the doctor and the psychologist.’ Most people would no doubt omit the latter owing to their ignorance about him, so let us pass him over for the present and appeal to the doctor.

The medical view concerning insane impulses.

It is not proposed to write a medical treatise on insanity: we are quite content to take the results of those who have studied insanity medically as summed up in any leading work on medical jurisprudence. The following will suffice:—

“There is a general consensus of opinion among writers on insanity, *1st*, that one effect of insanity may be a weakening of the affected individual’s power of self-control; *2ndly*, that in some cases the power of self-control is totally lost, the result being the production of an uncontrollable impulse—*i.e.*, an impulse which nothing short of mechanical restraint will control to do certain acts; and *3rdly*, that such weakening or total loss of the power of self-control may occur both in insanity accompanied by delusions and in insanity unaccompanied thereby.

The question therefore arises:—Suppose *A* to have killed *B*, and the only thing proved about *A*’s insanity is that by reason of insanity, *A*’s power of self-control was, at the time he killed *B*, weakened or entirely lost, what would be the legal effect? To this question it may be answered:—



1. That any weakening short of total loss of power of self-control would not entitle *A* to an acquittal, either under Indian or English law.

2. That according to Indian law, total loss of power of self-control would not entitle *A* to an acquittal, except the Court consider it proved that, by reason of such total loss, *A* at the time of doing the act was, in the words of the section, 'incapable of knowing the nature of the act, or that he was doing what is either wrong or contrary to law.'

3. As regards the law of England on this last point, Sir J. F. Stephen states that it is doubtful whether or not an act is a crime if done under the following circumstances: by a person suffering from mental disease, who at the time of doing the act was by such disease totally prevented from controlling his own conduct.'' (a)

The reason why we have included that part of the quotation which refers to the legal effect will appear later: what we now desire to lay stress on is that according to 'a general consensus of opinion among writers on insanity' (by which phrase we understand medical writers) uncontrollable impulses do exist. We also desire to quote the opinion of the individual doctor who is perhaps the best known medical writer on this subject. Dr. Maudsley objects strongly to the legal criterion of insanity because it omits the question of the man's power to do or abstain from doing an act, and speaks of "the scorn and indignation felt by those who observe with impatience the obstinate prejudice with which English judges hold to an absurd dictum which has long been discredited by mental science, has been condemned in the severest terms by judicial authority in America and has been abandoned in other countries." (b) He says that a man may be mad and yet free from delusion, and a morbid impulse may take such despotic hold of him as to drive him in spite of reason and against his will, to a desperate act of suicide or homicide. He is possessed by a power which forces him to a deed of which he has the utmost dread and horror. His intellect is clear and his knowledge

---

(a) Lyon's Medical Jurisprudence for India, 3rd Edn., by Waddell, p. 362.

(b) H. Maudsley, Responsibility in Mental disease, 5th Edn. Preface, p. 6.

of right and wrong in regard to the act most keen, but the intellect is at times so completely the slave of the morbid impulse that it is constrained to watch for opportunities and to devise means to carry the act into effect. No one who had not seen it could believe what ingenuity there may be in planning and what determination in executing a deed which all the while is reprobated as most wicked.

“ There are very few persons engaged in the study and treatment of insanity who have not, like Esquirol, begun by doubting the existence of cases of real impulsive insanity, there are none who, after having had a large enough experience have not, like him, been compelled to abandon their doubts. To those who judge by the experience of a sane self-consciousness and so pre-judge the facts, it seems an inconceivable state of mind, or, at any rate, it seems inconceivable that a person in such a state of mind should not have the power to control the insane impulse : to those who form their conclusions from observation and experience of facts of the disease, and so interpret them fairly, no doubt of its existence is finally possible”(a)

The result of our appeal to the doctors is therefore strongly in favour of the view that persons do sometimes commit crimes owing to impulses which are beyond their power to resist. The verdict of the psychologists is in accordance with that of the doctors.

View of psychology concerning insane impulses.

Ribot speaks of the great group of irresistible impulses which includes the ungovernable craving for drink, the unconquerable impulse to steal, to practise incendiarism, to kill, to commit suicide. He explains them physiologically as depraved tendencies due to degeneration of the organism : the conditions of their genesis are beneath consciousness, the results only of this unconscious work are known.(b)

The authors of animal Magnetism similarly recognise<sup>2</sup> them and state that the suggested impulse to persons in the hypnotic state resembles the irresistible impulse of insane persons in their

---

(a) H. Maudsley, pp. 134—144.

(b) Ribot, *Psychology of Attention*, pp. 108—111.



anguish when they are restrained from accomplishing the act and their relief when it is accomplished.(a)

Prof. Stout quotes several cases and explains these impulses as sometimes due to imperfect powers of deliberation, the absence of inhibiting tendencies and sometimes to the positive strength of the impulsive idea which leads to action. There is a conflict, he says, between the self as a whole ranged on the side of the volition and the isolated impulse to action which derives its strength merely from the fixation of an idea by pathological conditions. The conation which resists the will arises primarily from the fixation of the idea in consciousness, which under pathological conditions does not arise from any desire for its object. Indeed the feeling towards the ideally represented object is sometimes that of intense aversion.(b)

Other psychologists could also be added to the list, but it is perhaps unnecessary to quote further.

9. It being established then by the joint evidence of the doctors and psychologists that 'uncontrollable' impulses exist, what is the reason why the lawyers refuse to recognise them and assert that they are insufficient to establish the legal plea of insanity?

In reply to this we will quote Mr. Mayne's view of the matter in his own words.(c) "It is certainly conceivable that there might be a state of mental disease, which would deprive the sufferer of all capacity to resist a particular impulse, while it left him the perception of the nature and consequences of the act to which he was impelled. The insuperable difficulty in the way of giving legal effect to such a defence would be, that it would be impossible to establish it. We can tell that a man has not resisted an impulse, but how can we tell that he could not have resisted it, or why he could not. It is a matter of every-day experience that persons who are subject to no mental disease yield to apparently uncontrollable fits of passion but we hang them all the more on that

Mr. Mayne's view  
of legal insanity.

(a) Binet and Féré, *Animal Magnetism*, pp. 282, 292.

(b) Stout, *Manual of Psychology*, pp. 620—8.

(c) See *Criminal Law of India*, p. 412.



account. If a man who is mentally diseased acts in a similar way, how are we to know that his want of control is due to his mental disease, or that his mental disease did more than supply him with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen? Even in a lunatic asylum some sort of discipline is maintained by pains and discomforts inflicted upon the patients, and they learn to exercise some self-restraint in order to avoid the infliction. If a case arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code. If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the executive not by the exempting power of the judge."

In the first place Mr. Mayne starts by admitting that it is merely conceivable that there might be such a thing as an uncontrollable impulse. On this we have to remark that he is either entirely ignorant of the results of the studies of the doctors and psychologists or else he deliberately either rejects or ignores them. Otherwise he would clearly have admitted the existence of such impulses in a less diffident manner. Not having this knowledge or else rejecting it, on what knowledge, we would ask, does Mr. Mayne proceed to lay down the proposition that you cannot prove that an impulse was uncontrollable? As far as we can see, he appears to think that he has proved his case by merely asking a few helpless questions of a weakly sceptical nature. His argument simply amounts to asking 'how am I to know that of which I am totally ignorant?' The natural reply to such an interrogation would be 'by asking those who know'; in this case the doctors and the psychologists.

It appears to us that a parallel to Mr. Mayne's attitude in this matter would be that of a man who had never studied astronomy, who, on being told that there would be a meteoric shower over part of the British Isles on a calculated date, replies: 'I can't accept the statement, how do I know that it is not going to Kamschatka?' If Mr. Mayne is acquainted with the conclusions of medical and psychological research, does he think that those con-

clusions have been arrived at on no evidence at all? If not, and it has been proved to the satisfaction of the most learned men who have studied the subject that uncontrollable impulses exist, what right has he, who is clearly ignorant of the way they have obtained their conclusions, to assert that it cannot be proved that an impulse is uncontrollable? We can only describe it as setting up ignorance against knowledge, and marvel at those judges who deliberately prefer, instead of accepting the wisdom of the doctor and the psychologist, to fall down and worship Mr. Mayne's ignorance, merely because he has included it in a book on law.

The fact is that this part of his treatment of insanity is entirely valueless through lack of knowledge of the subject on which he writes. When he states that many people who are subject to no mental disease yield to apparently uncontrollable fits of passion and commit crimes, he does not realise that fits of passion are not the same thing as these insane impulses. No doubt the progress from sanity to insanity is a gradual one, as has been pointed out in the chapter on Illusions and Hallucinations, but the physical and mental symptoms of insanity are known to students of it and description of some of the forms of it will be found elsewhere in this volume. The doctor and the psychologist know from observation of a person and his history whether he is suffering from mental disease and what grounds there are for attributing to him the want of the power of self-control. When these symptoms are found to co-exist with actions that are not usually committed or not by the class of persons in question, so far as human experience tells us, the presumption is strong that we have here cause and effect, and the mere possibility of its being otherwise is not, in our opinion, sufficient to destroy the force of the natural inference.

Mr. Mayne further asks, when mental disease does exist how are we to know that it did more than supply the man with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen?

The words 'if he had chosen' plainly beg the whole question so far as 'uncontrollable' impulses are concerned. Such a question, however, merely shows that the author is completely ignorant



of the part which the emotions play in madness and has no clear idea of what a motive is, or how ideas come to pass into action, or in what choice consists, or what is the meaning of control. It seems not improbable that he believes in the existence of a separate faculty of control, as the judges did in that of cognitive faculties.

Of course psychological knowledge is not required for the use of such words in ordinary life, and it would be pedantic to insist on it, but it is a different matter when a man is undertaking to write on the subject of insanity. A knowledge of the way in which emotion influences action and of the manner in which ideas are inhibited and maintained in consciousness and of the effect of organic disease in perverting emotions and inclinations would have dispensed with the desire to put such questions. Towards the end of the paragraph we find the usual disposition to hedge on the part of the person who is uncertain of his ground and whose conclusions are opposed to the popular instinct. We have no doubt that the plain man does believe in the existence in some cases of 'uncontrollable impulses,' and is divided between the desire to exempt from punishment in such cases and the fear that if he admits his conviction, some who do not really suffer from them will escape the penalty of guilt and so the public safety will be affected. This being so, it is an uncomfortable doctrine that though they exist uncontrollable impulses can never be proved; it must follow from such a state of things that some persons will be hanged and punished who avowedly could not help what they did. Although, therefore, Mr. Mayne gaily starts with the assertion that in the case of those who cannot control their passion 'we hang them all the more on that account'—(an assertion which, by way of parenthesis, we are happy to be able to assure the reader is not true *vide* exceptions 1 and 4 to s. 300 of the Indian Penal Code)—towards the conclusion of the section he changes his tone.

"If a case," he says, "arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code." Mr. Mayne might again be less diffident and less hypothetical, for such a case would certainly fall under the grounds of exemption cited



for the reasons given by us in the earlier part of this chapter, *viz.*, that owing to the close inter-connection of the cognitive, emotional and volitional states, one cannot be affected without at the same time affecting the others. It will never fall under either of those grounds if the lawyers are right in the division of the faculties which they make. But what an astonishing admission to come from Mr. Mayne ! If an ‘ uncontrollable impulse,’ for it is nothing else than this to which he is referring, would fall under one or other of the grounds of exemption allowed in the Penal Code, why trouble to maintain the theory that such impulses are not a sufficient ground for the plea of insanity ? Why combat the correctness of Sir J. F. Stephen’s view and assert that the judges by their answers in McNaghten’s case excluded such a defence, for if it is not allowed in English Law, *a fortiori*, is it negatived by the Indian Penal Code ?

But this is not all : so humane does our author at length become that he provides an alternative, in case the last suggestion should not be accepted, as follows :—“ If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the executive, not by the exempting power of the judge.”

But why speak of mercy unless the writer really believes in the existence of uncontrollable impulses and the possibility of their proof ? It is clear that Mr. Mayne has all along been maintaining a thesis of which he was doubtful, or else that at the last he makes a weak concession to popular feeling and tries to throw the responsibility on some one else. There is no conceivable reason why the executive should be called in here to undo the work of the law unless that work has been wrongly done : for the executive is in no better position to determine the existence or non-existence of uncontrollable impulses than are the judges who try the case, and who are able to call for all available evidence on the point. The question to be settled is not whether a severe or a light sentence should be passed, but whether the man should be punished at all.

The burden of proof in cases of insanity.

10. Let us now proceed to consider the question from the second point of view. This may be briefly re-stated as follows :—

It being shown in the earlier part of this chapter that the cognitive, emotional and volitional processes cannot be separated and do in fact never occur apart in consciousness, their interdependence is such that it is impossible that a derangement or perversion of any of these mental states can exist without extending through the whole psychical complex and affecting the other processes which enter into the total combination. If this be grasped as the groundwork of the argument, it seems to us that it must necessarily follow that, if it be shown that such a perversion of the emotions or volitions has occurred, the presumption to be drawn must be that the intellect has also been affected. At present the opposite presumption is made, as, *e.g.*, in the Calcutta case, because of the erroneous doctrine of the separate existence of cognitive faculties: with the overthrow of that dogma and the substitution of the inter-dependence theory, exactly the contrary inference should in future be drawn. The burden of proof will then lie on those who assert that the intellect has remained unaffected and the man was sane.

No doubt they will appeal to his actions and his words and point out that he employed considerable cunning: that there was deliberation and preparation for the act, and that it was done in a manner which showed desire for concealment. Or again, that after the crime he showed consciousness of guilt and made effort to avoid detection or made false statements when charged with the act.<sup>(a)</sup>

Such facts, however, are not sufficient. In the first place it is known to every superintendent of an asylum that these very qualities are displayed by lunatics who would fully satisfy the restricted test of the Indian Penal Code as it is now interpreted. This, however, is a minor point. The view that we desire to urge is that the intellect is not destroyed in many cases, but is merely perverted to a use to which it would not otherwise be put by the fact that the end or purpose is a wrong one. The intellect becomes the servant of the impulse, and it is idle to urge that the man is sane because he employs the usual means to an end if insanity has deprived him of the power to choose

---

*a)* See Mayne, *op. cit.*, p. 421.



that end. The opponent of the alleged insanity will, therefore, have to prove that there is nothing abnormal about the act itself rather than about the way in which it was done : he will have to show, *e.g.*, that it can be accounted for as due to some ordinary motive, that what was gained by it was not disproportionate to the means employed, that the risk incurred was such as most men would be prepared to face, or that the object was neither pursued with unusual vacillation nor with excessive tenacity considering the value that would ordinarily be put on it.

Again if the deed ran counter to the agent's own interests or natural affections and was further an important one, which could not be attributed to mere carelessness, some explanation would have to be suggested, even though its accomplishment showed considerable ability on the part of the doer.

That mere comprehension of the difficulties to be overcome and ability in employing appropriate means to attain the end and to escape detection are not in themselves proofs that the agent is responsible for his acts might be inferred from the analogy of hypnotic patients. These people act entirely on the suggestion of others and have no volition of their own as regards the end of their actions, yet nevertheless they exhibit remarkable resource in inventing means for the attainment of the purpose suggested and often practise dissimulation with extraordinary skill. Indeed, a lesson may be drawn from their case which cannot fail to impress the candid observer. Here we often have all the apparent signs of intellectual capacity present so that before we are informed that they are acting under the suggestion of another, we should, on this account, see no reason to suppose that they are other than agents responsible for their acts. We only judge them not to be so because of the abnormal nature of the acts themselves and the perversion of the ordinary emotions which they exhibit. Yet no one who has seen hypnotic displays doubts that these people are really irresponsible, or, if he does doubt, it is not on the ground that their 'cognitive faculties' appear to be unimpaired, but merely because he suspects that their emotions are feigned. Granting the genuineness of their emotional exhibitions he at once admits their irresponsibility, and he is always convinced when he is shown transi-

The analogy of  
hypnotic patients.



tions of the patient from one mood to another with all the attendant signs at the word of the operator.

Now it is admitted that in the case of the insane we cannot in the last resort appeal to a first cause as visible as the operator in hypnotism, because the causes of madness often lie in the organism below the threshold of consciousness. But we can demonstrate the perversion of the emotions and volitions in a similar manner as in the case of hypnotic patients, and when these symptoms have been proved, we ask for the same treatment as that accorded to the hypnotic experimenter.

The spectator who is there convinced of the genuineness of the emotional display says, 'I believe that the man is irresponsible for his acts,' and this although the patient's intellectual processes appear to be normal. It is not necessary to call in the presence of the operator except to convince him on the first point : his conclusion as to the irresponsibility then follows.

But in the case of the lawyer it is otherwise : he will often admit that the abnormality of the emotional or volitional processes is satisfactorily proved in the case of the alleged insane, but he will not believe that the man is therefore irresponsible because he says that his intellect appears to be unaffected. If this is a good ground to remain a sceptic here, why does he not similarly remain a sceptic as to the responsibility of the hypnotic patient, for the conditions are the same in his case ?

The subject of insane impulses will be recurred to again later in the chapter on Responsibility and in the remarks on Moral Insanity and Hereditary Diseases, some repetition being unavoidable.

## CHAPTER XII.

### INSANITY (CONCLUDED).

Not every mental disease implies irresponsibility—Suggested criteria—Degeneration—Irresistible impulses—Epilepsy, hysteria, mania—Forms due to excess of impulse—Criticism of certain legal opinions on the test of unsoundness of mind—Mental diseases due to defect of impulse—Aboulia, melancholia, hypochondria—Delusions—Fixed ideas—Different standards of insanity in law—Lucid intervals—Idiocy—Legal presumption that insanity continues how far valid.

Moral insanity and hereditary diseases—the moral and physical not distinct—both depend on the organism—moral insanity wrongly classified—special reasons why judges and lawyers should study insanity.

WE must not however be taken to preach the doctrine that every abnormality of the emotions or volitions that is proved, however slight it may be, is sufficient ground for claiming that a man is not legally responsible for his actions. An attempt will now be made to indicate which forms of disease should be regarded as madness, and where psychologists as far as possible draw the line between soundness and unsoundness of mind.

So far as impulse is concerned, the unsoundness of mind may be due either to defect of it, as in aboulia or lack of will, or again it may be due to excess of it. The latter cases are more frequently regarded as madness and so we will first treat of these instances of excess of impulse.

Dr. Maudsley states that there are sometimes striking coincidences between the exacerbations of the mania and disturbance of the bodily health, changes in the physical and mental symptoms before the outbreak. The deed of violence is as it were, the explosion of the feeling of anxiety and distress, a discharge which the man must have of the terrible emotion with which he is possessed. There are four things noticeable in homicidal mania :—

- (1) The paroxysmal nature of the actual violence, which takes place only when the emotion becomes unendurable.
- (2) The mighty relief the patient feels when he has done the deed, so that he may give a rational account of himself.
- (3) The frequency with which the attack is made upon a near relative or upon any one, friend or stranger, who happens to be at hand when the paroxysm occurs.
- (4) The indifference displayed afterwards to the dreadful nature of the deed, because it was done when the man was alienated from himself.(a)

There are three criteria suggested by Ribot, *viz.*, the long duration of the emotion, disproportion between cause and effect experienced, and excessive or insufficient re-action.(b) And again an emotion is morbid when it is apparently disproportionate to its cause or it is chronic, or its physical accompaniments are of extraordinary intensity.(c)

Another sign of importance is the appearance of the fixed idea. All the overpowering tendencies connected with the offensive instinct have a regular course; a physiological period of incubation marked by palpitation and vaso-motor disturbances marked by certain symptoms; then the entrance into the psychological period marked by the appearance of the fixed idea. This fixed idea gives an aim to the tendency: it includes an emotional state in some degree and is the beginning of an impulse; the third period is that in which it passes into action, though it is not always that it does this.

Now the presence of the fixed idea alone does not mean irresponsibility for an act, but as soon as it becomes an impulse and passion springs up suddenly and triumphs immediately, that stage is reached.(d) All these creations of impulse have the same characteristics: they are conscious, inco-ordinated and incapable of struggle.(e) This is why these tendencies are called 'irresistible': to produce restraint there must be time, but in these cases

(a) H. Maudsley, *Responsibility in Mental Disease*, pp. 193—6

(b) Ribot, *Psychology of the Emotions*, pp. 62-63.

(c) *Ibid.* pp. 212-13.

., pp. 226, 412-3.

., *Diseases of the Will*, p. 62.



the incitation is so violent as to pass immediately into action and all is over.

There may be fixed ideas with obsession or possession of the individual that do not necessarily mean that he is unable to control himself, but these have their origin in intellectual states, pure ideas (not wants or feelings), *e.g.*, a man must always be counting, knowing names, asking questions, etc. These are not really important because their satisfaction is without danger though they are apparently what the judges referred to in the preceding chapter would specially recognize as indicating an impairment of the cognitive faculties.

2. Most writers explain the origin and appearance of irresistible impulses by degeneration, *i.e.*, dissolution and retrogression. It is advisable to explain what this really means. Degeneration is a return to the reflex movements, it goes back to the stage of psychic life when the will as the arrestive power was not yet constituted. It acts on the line of strongest attraction or the least resistance, which is characteristic of reflex action and the opposite of the inhibitive will.<sup>(a)</sup>

There are regular stages from this region of reflex actions, where the state of consciousness expresses itself immediately in action up to abstract ideas where action is altogether inhibited. These irresistible impulses show us the individual reduced to the lowest degree of activity, *viz.*, that of pure reflexes: the acts, if not unconscious are not deliberate, they are immediate, irresistible with an adaptation invariable and of little complexity.<sup>(b)</sup>

The automatic character of these impulses is then a sign that they at least approximate to the class of reflex actions and are therefore due to degeneration, and the fact that they are frequently proved to be hereditary assigns them an organic origin.

Irresistible impulses may be divided into two classes, *viz.*, those with consciousness and those without.

Irresistible impulses.—Epilepsy and Hysteria.

Instances of the latter are epileptics and hysterical persons: no one doubts that both of these classes are irresponsible for their acts.

(a) Ribot, *Psychology of the Emotions*, pp. 226—8.

(b) Ribot, *Diseases of the Will*, p. 57.

They display in a marked degree one of the tests already alluded to, *viz.*, physical accompaniments of extraordinary intensity, and their movements are further in the nature of reflexes and automatic in character. Yet the transition from the normal to the irresistible impulse is gradual and epileptic madness corresponds to the lowest form of blind or animal anger which is extremely violent because connected with very powerful instincts. Next to this

comes the maniacal state corresponding to the  
 Mania.                      violent and conscious form of anger which  
 includes a pleasurable element.

In epileptic madness we find symptoms of anger carried to extremity resulting in blind violence, but the maniacal state may pass through all degrees from simple excitement to fury. These can be recognized by the physical accompaniments, which it would take too long to enumerate here and by the varying lack of co-ordination of ideas displayed. In some instances mania does not go beyond restlessness, craving for motion, exuberance of ideas, etc., and here the patient could not be considered irresponsible, but it is otherwise when the intense form is reached in which the symptoms of rage are found.

It may be remarked too that in both epileptic madness and mania these states are not evoked by any external excitement, such as the sight of an enemy in fury or disobedience. Hence they are described as motiveless, causeless, etc., but Ribot explains that "their cause, whatever it may be, is internal; it sets going a pre-established mechanism identical with that of anger (violent and disordered movements, vaso-motor phenomena, etc.), and the psychic form which follows is anger, or an analogous emotional form, with or without a concomitant state of pleasure." (a)

It is important to notice that this feature is present also in many cases of irresistible impulses which some dispute are instances of unsoundness of mind.

The other class of irresistible impulses with consciousness  
    are of affective origin, springing from needs  
 Other forms.                      and instincts. They include the impulses to  
    homicide, suicide, arson, alcoholic excesses, to

steal, &c., known as dipsomania, kleptomania, pyromania, erotomania and the like. The patient often has full consciousness of the situation and feels that he is no more master of himself but is irresistibly compelled to commit acts which he reprobates. Instances are known of men who voluntarily have gone to asylums, because convinced of their inability to abstain from acts of violence. The very last criterion to apply here is the fact that their cognitive faculties are not impaired: "the intellect remains sufficiently healthy, the madness exists only in the acts." (a) Those persons who cling to the traditional interpretations of knowledge of right and wrong and knowledge of the nature of the act as the tests of insanity, do not sufficiently realize that in the cases alluded to above they are in the region of the impulses and the instincts and not of the intellect, or at least that the intellect is no longer a power in the matter.

"The intellectual adaptation," says Ribot, "is very weak, at least very unstable: rational motives are powerless to act or restrain from actions: the impulses of an inferior order gain all that the higher impulses lose." (b) The will, *i.e.*, rational activity, disappears and the individual falls back into the domain of instinct; the will is impaired in measure as the lower activity is augmented. What remains is a struggle between two groups of contrary tendencies or impulses.

3. Before leaving the subject of irresistible impulses, *i.e.*, unsoundness of mind due to excess of impulse, Criticism of certain legal opinions. we may revert for a moment to certain dicta of legal authorities on the point. Thus Mr. Mayne, in a passage already quoted, states that it is a matter of everyday experience that persons who are subject to no mental disease yield to apparently uncontrollable fits of passion and commit crimes. To this we replied that these fits of passion are not the same as the irresistible impulses under discussion, and we may here quote Ribot's words on this point: "So long as anger is not injurious either to the individual himself or to others it is normal and even useful, . . . however, it must be recognized that the area of

---

(a) Ribot, *Diseases of the Will*, p. 58, *et seq.*

(b) *Diseases of the Will*, pp. 54, 65, 70.



normal anger is exceedingly restricted and that no emotion more quickly assumes a morbid character. Of the three tests which permit us to judge whether it does so or not, one—that of violent re-action on the organism—is of no use because it gives too much scope to personal estimates and conjecture. There remain two others—the absence of rational motives and chronicity or excessive duration, normal anger being only a passing affection. Now, we find among mental diseases two derivatives of anger, two heightenings of this condition in paroxysmal form, etc.,” and there then follows a description of the physical accompaniments.(a)

Now it is clear that Mr. Mayne simply looks to the one test which Ribot here declares to be of no use, and so says that he cannot distinguish fits of passion from uncontrollable impulses. We would invite him to apply the other two. At the same time we think that Ribot minimizes the value of the first test too much by his words. There is generally a difference in the very violence of the acts themselves, the importance of which should not be overlooked. These abnormally strong motor effects are due to the organic sensations involved in the unusually intense bodily concomitants of the affective mood. The physiological correlates of these sensations are enormously intense and have to discharge into the motor regions. Hence a motor result of abnormal violence. “Idea forces are absolutely out of the question when a man’s behaviour is without end or aim as is the case not only in these acts of violence, but also in the restless jactation of these patients.” Nothing but a morbid affective state is of sufficient psychical magnitude to produce such motor results, and in these states we miss immediately that provisional inhibition of the tendency to movements which is made possible by reflection on the various possibilities of action before us.(b) In the normal state passion is controlled because the antagonistic impulses to the suggestions of passion are still there at all events to a certain extent. The suggested idea does not pass into action because it awakens by the regular associative mechanism a set of antagonistic or inhibitive ideas on the folly of the demand and the

---

(a) *Psychology of the Emotions*, p. 223.

(b) G. Storrer, *Mental Pathology and Normal Psychology*, pp. 280, 285.

danger of the undertaking, and these associations are finally reinforced by the whole personality.”(a) When ordinary passion is not controlled these inhibiting influences still have some effect and by their retarding action lessen the motor results : in the case of the insane impulses inhibiting ideas play no part at all.

Again we may quote a saying of Rolfe, B. : “ It would be a most dangerous doctrine to lay down, that because a man committed a desperate offence with the chance of instant death and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity.”(b)

On this it is to be observed that, in spite of the learned judge’s opinion, this is one of the tests to be applied, *i.e.*, disproportion between cause and effect experienced, as already pointed out, for exceptionally violent actions are simply unusually violent emotions or impulses translated into action and these are in turn due, in the absence of any extraordinary cause to which they may be attributed, to an organic origin as already explained when speaking of degeneration

With this utterance of Rolfe, B., may also be contrasted the utterance of Bramwell, B., who made it a test to the jury “ would the prisoner have committed the act if there had been a policeman at his elbow ?” Apparently the former judge would have refused to regard the man as insane even in this case, while the latter judge would have excused him. This test, however, is really no better than the first one. Because a man would have restrained himself in the presence of a policeman it does not in the least follow that he was also able to do so in his absence. It is well known that an impulse may be inhibited by awaking another and contrary impulse and that automatism can be produced by the recollection of the use of an object when it is presented to the subject. “ An impulsive act is not unfrequently induced by the sight of an appropriate object. Max Simon gives an instance of a learned man who was seized by an overwhelming impulse to cut his throat when he was shaving, and who could only overcome it by

---

(a) H. Munsterberg, *Psychology and Life*, p. 240.

(b) *Reg. v. Stokes*, 3 C. & K., 185.



desisting from the operation.”(a) Hence the actual presence of a policeman and the associations of punishment connected therewith might be adequate to awake the emotion of fear in a man, whereas the mere recollection of the law might be quite unable to arouse any impulse at all; indeed in the presence of a strong impulse already in the field a mere idea of that kind would be highly unlikely to have any result.

A second dictum of Bramwell, B., was as follows: “It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But the circumstances of the act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless but resistible thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime punishable, you at once withdraw a most powerful restraint—that forbidding and punishing murder.”(b)

It appears to us lamentable that such an utterance should be reproduced as a guide to students, as it is apparently intended by Mr. Mayne. The judge seems to us to be so hopelessly on the wrong tack and to have failed so entirely to grasp the situation, because he will insist on treating madness as though it can be explained on normal grounds. No efforts of this kind can be successful: the ground of normal psychology must be abandoned here and the class of facts with which we are dealing must be treated by the pathological method.

---

a) Binet and Féré, *Animal Magnetism*, p. 282.

(b) *Reg. v. Haynes*, 1 F. & F., 666.



The situation is that we have an unusually powerful impulse to deal] with, and the reason of its unusual powerfulness is that owing to degeneration the organism is so constituted that impulse and instinct reign supreme while the intellect is powerless. Action follows immediately on incitement in an automatic way, analogous to a reflex-action, and allows no time to the arrestive power of the will to interfere. To talk therefore of religion, conscience and the law being powerful restraints in such a case is mere fiction : these represent certain influences which may be awakened by ideas in the normal state of mind when there is time for reflection and the will is active. The present field of consciousness is an entirely different one, in which the only power that could be of any use would be the immediate awakening of a strong counter impulse caused by some present stimulating external or internal excitement in the form either of a sensation or perception. We cannot help therefore regretting that the learned judge should reject what is in fact one of the tests that should be applied in the case, *viz.*, the absence of motive and should lay stress on considerations that have no possible application here.

The most important, however, of all the legal utterances on insanity were the answers of the fifteen judges to the House of Lords following the case of Macnaghten, because they are still the basis of the law of England on the subject.<sup>(a)</sup> The expression used in the questions put was in each case "persons afflicted with insane delusion in respect of one or more particular subjects or persons," and the judges were asked (1) what was the law respecting alleged crime committed by such persons ; (2) what are the proper questions to be submitted to the jury in such a case ; (3) in what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ; and (4) if a person under an insane delusion as to the existing facts commits an offence in consequence thereof, is he thereby excused ? About the fifth question we need not trouble.

---

(a) The questions and answers will be found on pp. 407—10 of Mayne's Criminal Law of India, 3rd Ed.

The judges replied that assuming the inquiries were confined to those persons who labour under such partial delusions only, the party would be punishable in the first case according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to the law of the land. In answer to the second and third questions, that the jury should be told that everyone was presumed to be sane and that to establish insanity it must be shown that, at the time of committing the act, the party was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. As regards the fourth question, they replied that the answer must depend on the nature of the delusion; assuming that the man labours under such partial delusions only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. Thus, if under the influence of his delusion, he killed a man whom he supposed to be trying to take his life, he would be exempt from punishment as acting in self-defence. If his delusion was that the deceased had injured him, and he killed him in revenge for such supposed injury, he would be liable to punishment.

It will be observed that these replies make knowledge of the nature of the act done and of the nature of right and wrong the test of liability, and take no account of the power of self-control. Sir William Markby criticises the answers on the ground that according to them "all the essentials of legal liability will on examination be found to be present in nearly every case," as instances in which a man's intellect is so disordered that he may altogether fail to perceive the consequences of his acts to himself or others are very rare. The form of putting the question to the jury, *viz.*, had the accused sufficient reason to know that he was doing an act that was wrong? does not involve a test of insanity generally accepted in law: he considers that it was really due to the notion which lurks in our criminal law though it is not admitted, that the moral quality of the act determines the liability to punishment. His conclusion seems to be that insane people



are not let off on any ground required by the judges, but probably from the desire to be humane in some shape or other, it being believed that the deterrent effect of the law is increased if it is held to be on the whole humane and just.(a) According to this writer it appears to amount to this that the test adopted by the law is such that no one can be held insane according to it, and therefore it is not in fact employed, but persons are excused by juries on other grounds not defined. This can hardly be considered a satisfactory state of affairs.

Dr. Maudsley condemns the replies for several reasons. He objects to the answer to the fourth question because it assumes that a man who has an insane delusion has the power to think and act in regard to it reasonably: that he can exercise the same knowledge and self-control which a sane man would have and exercise, were the facts with respect to which the delusion exists real. He quotes the utterance of an American Judge, Ladd, in the case of *State v. Jones* that this test of the law is inhumane as it holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required in perfect mental health. Also that by adding the words "and is not in other respects insane" it attempts to lay down what cannot be known. By this is meant that if insanity produces the false belief, which is the prime cause of the act, but goes no further, the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been affected by the delusion. Dr. Maudsley further observes that the first answer to the effect that a person is punishable if he knew at the time of committing the crime that he was acting contrary to the law really conflicts with that relating to the knowledge of right and wrong as an insane person may do an act which he knows to be contrary to law, believing it, by reason of his insanity, to be right.(b)

He states that the medical view as to monomania or partial insanity is that it takes from the affected person all responsibility for his actions on three grounds: (1) that a delusion may be

(a) Markby: Elements of Law, p. 354.

(b) H. Maudsley: Responsibility in Mental Disease, pp. 95 *et seq.*



concealed and so overlooked although it affected the conduct ; (2) that it is impossible to follow the workings of an unsound mind and discriminate between a healthy and morbid action thereof ; and (3) it is impossible to isolate an insane delusion and thus prevent the infection of its morbid nature from spreading, as the whole disorder is not restricted to one delusive idea, but the rest of the mind is in a more or less marked state of moral or affective alienation, a state in which insane impulses to violent acts are likely to occur.(a)

We do not think that either the questions or the answers can be defended, and, indeed, it would be surprising if they did constitute a correct direction on the subject of insanity. It must be remembered that the Macnaghten case occurred in 1843, and that therefore the opinions expressed as the result of it represent the knowledge of seventy years ago. At that time little was known about insanity, and it seems to us to be a striking proof of the antiquated and fossilized character of legal opinion, that the law is still content to use the notions of those times on a subject which has since been studied specially as a science. The decision springing from the Macnaghten case really contains almost every form of fallacy or omission. In the first place, both the questions and the answers exhibit an entire inability to realize that madness is an abnormality and a pathological condition. They proceeded on the assumption that you can treat it by ordinary methods, and that ordinary reasoning and inferences which hold good with respect to sound conditions may be applied to it with success and without injustice. Next, it is postulated throughout that madness is a disease of the intellect only ; hence the only test of it can be with reference to knowledge and the only symptoms of it are to be sought in delusions of judgment. Complete ignorance is manifested of the fact that it is the emotions and not the intellect which are mainly responsible for the madness, and that derangements of the intellect are in most cases produced by perversion of the emotions. It is not recognised that there may be madness without any overt sign of delusions, and no mention is even made of the question of the power to control impulses. This

---

(a) Maudsley, pp. 213-14.

indeed naturally follows from the failure to perceive the part which the emotions play in madness. Further, there is a hopeless want of psychological knowledge displayed in the attempt to cut up the mind into portions, and the assumption that such parts of the mind exist unconnected and uninfluencing one another. Lastly we are disposed to think that the whole idea that insanity may be adequately treated in law by laying down one or two tests, was due simply to the ignorance of the times about the nature of madness and the assumption of that period that madness was all of one kind. To us it appears that it is not a subject that can be handled in this manner. The question must be put in a more general form as, *e.g.*, that suggested by Dr. Maudsley: "was the act the product of mental disease?" And the reply must depend on the expert evidence in the case. The symptoms and tests are too numerous and too detailed to be included in a legal definition, and are known only to those who are intimate with the conditions of insanity after study and observation. Other countries seem to have adopted some such view, for they frame their provisions of law relating to insanity in general terms. In the French Penal Code it is said: "There can be no crime nor offence if the accused was in a state of madness at the time of the act"

In the revised Statutes of the State of New York it is enacted that "no act done by a person in a state of insanity can be punished as an offence." According to the German Penal Code: "An act is punishable when the person at the time of doing it was in a state of unconsciousness or of disease of mind, by which a free determination of the will was excluded."<sup>(a)</sup> This though not so general as the two preceding provisions, is more comprehensive than the test used in English law.

Aboulia, melancholia, hypochondria, etc., and disease due to defect of impulse.

4. We shall now briefly treat of some derangements due to defect of impulse, *viz.*, aboulia or lack of will, melancholia, lypemania, stupor, hypochondria and imaginary diseases.

Here the mental faculties except volition may be sound, the intelligence perfect, the end clearly conceived and also the means,

---

(a) Quoted by Maudsley, O. C., pp. 108-9.



but the transition to act is impossible. The patient may frequently manifest the desire to act but he cannot will to execute the acts desired, and this although the muscular system and organs of movement are intact.

The will fails here from an entirely different reason than in the case of irresistible impulses. There the power of inhibition and co-ordination being absent the impulse expends itself entirely to the profit of automatism : here, the intellect is sound but the impulse lacking. The intellectual apprehension of what should be done altogether outruns the power not only of carrying out but even of attempting.

Just as in the case of irresistible impulses there is a general heightening of the vital activities, so in the diseases now referred to there is a notable depression of them and a weakness of the natural states corresponding to the feelings.

It may be noticed that here again the test of the judges, *viz.*, the impairment or non-impairment of the cognitive faculties fails for "the cerebral acts which are the basis of the intellectual activity (the concept of an end and of means, choice, etc.,) remain intact, but there is lacking to them those concomitant states which are the physiological equivalents of the feelings, and whose absence occasions the defect of the impulse."(a)

The attention therefore must again be directed to the impulses and not the intellect when judging of such cases of unsoundness of mind. It may be pointed out that *aboulia* is produced by opium eating among other causes, and the reason of the unreliability of opium consumers as witnesses is not so much that their moral sensibilities or aspirations are weakened, as is sometimes supposed, as their volitional weakness. They cannot carry out what they desire but yield easily to another's will. In *hypochondria*, *melancholia* and such states there is a transformation of spontaneous attention into a fixed idea. These and what are called 'imaginary diseases' are often wrongly regarded as unreal; but although genuine diseases, there is no justification for classing persons so afflicted as insane. They may be described as debilitated and degenerate. There are certain organic disturbances with well-known physical

---

(a) Ribot, *Diseases of the Will*, p. 54, and pp. 28—40.



accompaniments, which first depress the feeling in general and then pervert it. Gradually these morbid states take form and organise and unify themselves in some false conception which becomes the centre of attraction to which all converges. They do not act like sudden emotions the effect of which is violent and temporary, but by slow silent actions of unconquerable tenacity that tend to modify the ego to its very depths.(a)

When the new feeling is of a powerful nature it completely changes the individual, but as the action is throughout gradual it is extremely difficult to say at what point the person can be deemed to be of unsound mind in the legal sense. That question, however, does not often arise because the tendency of patients of this class is to refrain from action: their disease mainly consists in their inability to act or to will, and so they do not bring themselves within the grasp of the law.

5. Finally it seems necessary to add something to what has been already said on the subject of fixed ideas.

**Delusions.** To the popular mind, fixed ideas and delusions are very frequently signs of madness, but neither are necessarily so.

Delusions are false opinions about a matter of fact and sometimes do and sometimes do not involve false perceptions of sensible things. In the case of the insane they are apt to affect certain typical forms hard to explain: in many instances they are theories which the patients invent to account for their abnormal bodily sensation; in other cases they are due to hallucination of hearing and sight.(b) Those who have studied insanity have no difficulty in recognising the typical forms, and the question whether the delusion denotes insanity or not is eminently one for expert evidence.

The lawyers have always overrated delusions as a test of madness; indeed in the Macnaghten case, as we have seen, they speak as though all forms of insanity must include delusions, which is an error. Sir John Nicholl in the case of *Dew v. Clarke* laid it down that delusion was the test of insanity, but Dr. Maudsley

---

(a) Ribot, *Diseases of the Personality*, p. 53, *et seq.*

(b) James, *Principles of Psychology*, Vol. II, p. 114, note.

states that 'the absence of delusions will not disprove, nor will the presence of delusion always prove, insanity.' Many insane acts are not the offspring of delusions but represent the overflow of morbid energy and are aimless and motiveless.(a) They occur most commonly in paranoia in which the person afflicted refers to himself all kinds of things not meant for him and so imagines that he is being persecuted. There is one important point about these delusions which we desire to note: the unfounded suspicions often attach themselves to previous suspicion which was well founded, as soon as the latter becomes complicated by a condition of irritable weakness. In this state affective excitement gets a stronger hold of the man, attains a higher intensity and persists longer.(b) Now the fact that the original suspicion was well founded often causes the case to be misjudged. A typical example is that of the paranoiac who suspects some one with reason of misconduct with his wife, and subsequently murders his wife or her lover and also others whom he happens to meet at the same time with whom he has no reason to be on bad terms. He usually utters words at the time which have reference to his wife's infidelity and hence it is argued that it is not a case of madness because there was an ordinary motive for the deed. The fact that he attacked others with whom that motive had no concern is ascribed to 'the thirst for blood' aroused by his first act, which for some reason or other seems generally to be considered a sufficient explanation. In reality it is no true explanation of it: the conduct as a whole is the motor discharge of the affective excitement as soon as it reaches a certain point of morbid intensity and the latter part is not caused by the first part, as such an explanation assumes. The specific character of the whole movement was directed by the motor idea of the wife's infidelity but the outburst itself was due to the disease of the organism.

Fixed ideas always coincide with an advanced stage of mental disease though they often are not a form of insanity in the legal sense. They may be merely a diseased excrescence which does not suppose a total trans-

---

(a) H. Maudsley, *Responsibility in Mental Disease*, pp. 133, 210-1.

(b) G. Störing, *O. C.*, pp. 216-9.



formation of the individual.(a) There are practically three classes of them, *viz.*, (1) simple fixed ideas of a purely intellectual nature ; (2) fixed ideas accompanied by emotions, such as terror and agony, the insanity of doubt ; and (3) fixed ideas of an impulsive form. These last manifest themselves in violent or criminal acts, such as suicide and homicide and are the only kind that should be held to indicate irresponsibility in law. They are in fact in such cases the irresistible tendencies already alluded to.(b)

Speaking of fixed ideas in general, Ribot says that they are a symptom of degeneration and the persons who have them are not therefore insane. " They certainly are not of sound mind ; but the epithet insane is undeserved. They are debilitated, unbalanced. Their frail, unstable mental co-ordination yields to the slightest shock ; but it is a loss of equilibrium, not a fall. The authors that have investigated the determining causes of fixed ideas, all reach the same conclusion ; they find it namely to be a symptom of degeneration. . . a primordial condition—the neuropathic constitution is requisite....."(c)

He also shows how the mechanism of the fixed idea resembles that of ordinary attention : there is no difference of kind but only of degree. The fixed idea has a greater intensity and a longer duration, but if a state of spontaneous attention were similarly strengthened and rendered permanent, the whole array of irrational conceptions that form the retinue and present a fictitious appearance of insanity would of necessity be added to it as the mere result of the logical mechanism of the mind. At the same time the fixed idea presupposes a considerable weakening of the will, that is of the power to re-act.(d) When a man possessed by a fixed idea is merely a witness who has to give evidence, his evidence will be accepted on other points than that to which the fixed idea relates. At least this is the case of the monomaniac, concerning whom it has been so laid down, and who is termed in the law decisions ' partially insane.'(e) This agrees with the view of

(a) Ribot, *op cit.*, pp. 136-7.

(c) *Ibid.*, pp. 82-3.

(b) Ribot, on Attention, pp. 78-9.

(d) *Ibid.*, pp. 84-7.

(e) Ameer Ali and Woodroffe, Indian Evidence Act, p 801.



Ribot already quoted that a fixed idea is often only a diseased excrescence which does not suppose a total transformation of the individual.

6. At the same time the designation 'partially insane' is not of much assistance: it does not help us to decide at what point in the gradual transition from the normal to the abnormal the individual is to be considered of unsound mind, which is the real crux. The law employs a different standard when it is a question, *e.g.*, whether a man is to be held responsible for a murder, or whether he is to be held to a contract which he has signed. Thus Best remarks that there are two, if not more, distinct standards of mental alienation known to the law, *viz.*, (1) that which is sufficient to exculpate from a criminal charge where ordinary lesion of intellect is not sufficient, but there must be unconsciousness of commission of a crime; (2) the degree of insanity which will support a commission of lunacy, *i.e.*, a state of imbecility and incapacity to manage affairs; (3) the degree of unsoundness of mind which will avoid contracts, deeds, wills, &c., which is intermediate between (1) and (2). (a) Thus it has been held that mere weakness of mind or partial derangement does not make a man incapable of contracting. (b)

Indeed English lawyers appear to have a curious doctrine that, however, disordered his intellect may be a person may make a valid contract because no one is allowed to plead his own mental deficiency, also in other civil matters not connected with wills, there seems to be no rule except the above one, which is attributed to Lord Hale. (c) What the justice or sense of it may be is not apparent to us.

In testamentary cases the testator is considered sane if he is 'of sound mind, memory and understanding.' (d) This is general and so preferable to the manner in which the matter is dealt with in criminal law, but we have pointed out in our chapter on memory

---

(a) Best on Evidence, § 150.

(b) Cunningham and Sheppard's Indian Contract Act, p. 47 and cases quoted in note (a) there.

(c) Markby, Elements of Law, pp. 356-7.

(d) Dr. C. A. Mercier, Sanity and Insanity, Edn. 1890, pp. 98-104.

that in some cases a man may be quite sane though his memory fails. There are, however, also decisions to the effect that insane men may sometimes make a sane will and that the will itself, if appearing to be a rational act rationally done, is evidence of a lucid interval. This seems to depend on the view that all madness is concerned with delusions and will show itself in some form of intellectual derangement, and so we think is rightly criticised by Dr. Maudsley on the ground that a will may be influenced by disordered feelings and display no evidence of this on the face of it.(a)

In an inquisition in lunacy the actual issue is 'Is the subject of the inquisition sane or insane?' and the test is whether the patient is capable of managing himself and his affairs. In order to determine this the jury have to look to the man's conduct and they have not to decide what the man knew when he did any act.(b) The test is thus more comprehensive in character and the jury are not tied down to look only at certain points as they are in criminal cases. We see no objection to the lawyers adopting different standards of insanity in criminal cases and in different civil matters, but we object to the test they have chosen for the former class of cases and think that it is in the latter that they approximate most to a correct handling of the matter. We cannot, however, decide the mental state entirely by looking to the consequences of the action or of our decision, if that is the real ground of these different tests, all we can do is to recognise that there is a wide border land between sanity and insanity and that for the different purposes of civil and criminal law it is allowable to fix the point at which insanity begins at different places. The reason of this is that a man may be sane for some purposes but not for others, in spite of the fact that if it were necessary to give a decision in the terms of 'sane' or 'insane' he would have to be classed as insane. The trouble with the law is that it tries to force a decision in general terms and not with reference to the purpose in hand: in the case of crime, it tries by its inadequate test to force it in the direction of 'sane,' while civil law sometimes allows greater latitude and distinguishes with reference to the end in view.

---

(a) H. Maudsley, O. C., pp. 117—19.

(b) Mercier, *Ib.*



7. There remain for consideration lucid intervals in insanity and idiocy.

“The idiot,” it is said, “can never become rational; but a lunatic may entirely recover or have lucid intervals . . . thus a lunatic during a lucid interval may be examined.”(a) It is also provided in s. 12 of the Indian Contract Act that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Any opinion to the contrary would appear to be due to a false idea of the ego or self: there may be a diseased organism but there is no permanently existing diseased self which appears and disappears at intervals, and thus may infect the intervening period during which the subject is apparently sound, but the preponderating state of consciousness at each moment constitutes to the individual and to others his personality.

“These contradictions in the personality,” says Ribot, “these partial scissions of the ego, such as are found in the lucid moments of insanity and delirium, in the self-condemnation and reprobation of the dipsomaniac, while still drinking, are not oppositions in space (from one hemisphere to the other) but oppositions in time . . . successive attitudes of the ego. . . . If we are thoroughly impregnated with the idea that the personality is a consensus, we shall have no difficulty in comprehending that the mass of conscious, sub-conscious and unconscious states which constitute it, may, at any given moment, be summed up in a tendency or preponderating state which is its momentary expression both to the individual himself and to others. Suddenly the same mass of constituent elements is recapitulated in some contrary state, which thereupon assumes the front rank.”(b)

That the idiot can never become rational is perhaps too sweeping a statement: it ignores the fact that there are degrees of the state. “Idiocy has various degrees from complete nullity of intelligence to simple weak-mindedness, according to the point at which arrest of development has taken place.”(c) At the same time it is true that when the

(a) Ameer Ali and Woodroffe, *op cit.*, p. 801.

(b) Ribot, *Diseases of the Personality*, p. 111.

(c) Ribot, on Attention, p. 103.



idiot is one whose brain does not contain the whole cerebral mass you cannot create it, though in the case of the young where it has been due to some malformation which has prevented the brain from developing removal of the cause will lead to improvement.

To educate imbeciles and idiots is extremely difficult because they are bereft of the power of attention ; the system is to make use of those senses which fulfil their function in order to develop those which do not, and after a long course of training “ it becomes possible to raise the idiot more or less near to the level of ordinary perceptual consciousness.”(a)

It has sometimes been remarked that persons of this type are particularly trustworthy as messengers and in carrying out instructions, if you can once get into their heads what it is they are required to do : this is due to their narrow range of interests and the resulting absence of distracting considerations. For the same reason they sometimes show unusual powers of memory : they recall remarkable series of objects contiguous in time and space because there are no other divergent lines of association to compete with those which are formed by the mere sequence of external impressions.(b) To distrust systematically the idiot as a witness would therefore be an error : within the limits of his observation he may be expected to be particularly correct in his account of occurrences. It has been ascertained by experiments that idiots are often well oriented in space, but not at all in time, whereas the converse is never true. Further the degree of efficiency of attention is relatively independent of the level of general mental development and likewise in the case of development of speech. It would be wrong to assume that because one idiot was more proficient at speaking than another, he was also more developed in other respects.(c)

8. There is said to be a presumption in law that insanity which has been once established will continue, and that the burden of proof of a subsequent lucid interval lies on the party who asserts it.(d)

Presumption that  
insanity continues.

(a) Stout, *Anal. Psych.*, Vol. II, p. 29.

(b) Stout, *Manual of Psychology*, p. 457.

(c) G. Störring, *O. C.*, pp. 249-50.

(d) *Best on Evidence*, p. 341.

This is based on another general presumption that things generally remain the same, including persons, personal relations, states of things, individual's opinions and states of mind.(a)

It is not supposed that such a presumption really weighs very much, but we cannot refrain from remarking that the value of it is simply nil : it is mere prejudice, and, as Mr. Bradley says, "the general disposition to believe that what has been is, or that what is usually is always, cannot seriously be offered as a conclusive argument."(b) Apparently, however, in law it would be conclusive in the absence of any evidence to the contrary, in spite of its lack of foundation. As we have occasion to examine this general presumption again in other connections we shall not say anything further about it now, but so far as it is applied to insanity we will quote the improved form in which it has appeared in Ameer Ali and Woodroffe's edition of the Indian Evidence Act, *viz.*, "there arises, in the case at any rate of insanity of a permanent type, a presumption that insanity continues." And again, "sanity or insanity once proved to exist is presumed to continue ; but *aliter* as to temporary insanity produced by drunkenness, violent disease or otherwise."(c)

What we would ask is, where is the presumption in either case ? Both statements appear to be mere truisms if one is to attach any meaning to the words ' permanent ' and ' temporary . ' Of course if the insanity is of a permanent type it will continue : you know it is permanent and therefore you know it will continue, for what is a permanent thing but that which continues ? You merely state the same thing twice over in different words and there is no presumption in the matter.

Similarly with regard to ' temporary , ' how can you call a thing temporary unless you also know that it will come to an end ? And, if you know that, there is no presumption in saying that it will not continue. It would seem therefore that the learned authors did not feel satisfied as to the truth of the ordinary legal presumption quoted above and therefore attempted to import some cer-

---

(a) Taylor on Evidence, §§ 196, 197. (b) Mind, N. S. No. 49, p. 31.

(c) Ameer Ali and Woodroffe, *op cit.*, pp. 732 and 712.

tainty into it by the use of tautology, a method which may be satisfactory to them but not very luminous to the student.

The fact appears to be that no general presumption can be drawn concerning the continuance or non-continuance of insanity : it is possible to draw presumptions from the symptoms of certain kinds, because these indicate that the madness is an incipient stage of a form that never disappears but continues to progress. As however some forms are only periodic and in others recovery is usually certain, unless other causes supervene, to presume here that the insanity will continue is mere error.

9. The subjects of moral insanity and hereditary diseases. are so much concerned with the question of responsibility that we are compelled to repeat later some of the remarks made here. The attitude of most persons towards so-called moral insanity is to refuse to recognise its existence, and this no doubt is the legal position : at the same time those who hold this view are somewhat uncomfortable about it and betray some hesitation in their utterances. This is illustrated by the following passage :—“ Now the researches of modern physiologists have shown that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured ; and that there are many inferior forms of diseased or disordered mind and imagination which influence the conduct of persons who are, in other respects, perfectly capable of taking care of themselves and transacting the ordinary business of life. Some even go so far as to assert that there exists a form of the disease to which they have given the name of ‘ moral insanity,’ in which no *delusion* of any kind exists ; but the patient’s moral character is revolutionised, and he is hurried against his will, by some uncontrollable impulse, into the commission of acts of violence and crime. Although this state of mind is not recognised in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries show how arbitrary and imperfect any line drawn by law on such a subject as the present (*i.e.*, insanity) must necessarily be.”(a) The writer has little doubt personally that many who decline to

---

(a) Best on Evidence, § 150.



recognise moral insanity do so in defiance of their own beliefs, simply from the conviction that, if its existence were acknowledged, it would deplorably affect the safety of society : they hold that every criminal would plead it, and that there is no satisfactory criterion by which to decide the truth or falsity of such a plea. It would therefore play fast and loose with responsibility and bring disorder and confusion into the criminal law.

How far such a utilitarian attitude is justified appears a question of moral and political philosophy which cannot be discussed here : it is touched on later under the heads of Responsibility and Punishment. At the same time it is always an unsafe position to assert what is contrary to one's own beliefs, and in the writer's opinion it is better to admit what seems to be true and, facing the situation, to take the best measures one can to meet it.

Most will allow the existence of homicidal mania, but some will not that of kleptomania, because in the one case they are prepared to go the further length of shutting up the culprit in a mad-house while in the other they are not, but will only go so far as to shut up the man in prison : this is usually a mere compromise based upon what is supposed to be compatible with the interests of society in each case. It is true that some will defend the distinction by asserting that the homicide gains nothing by his act, and therefore his crime being without a motive he must be mad, whereas the kleptomaniac is prompted by gain : his act is not motiveless, and so one of the signs of madness is absent. This argument however is overthrown by the many instances which can be adduced of persons comparatively rich who have stolen articles which they could have easily bought, and also by the valueless character of what is sometimes stolen. Indeed in such cases exceptions are frequently made in our law courts and the accused is held not to have been responsible for his act.

The difficulty is greater in cases of unprovoked assault, sudden indulgence of the sexual passions and the like : in the former there is the same want of motive, and in the latter we are too ignorant of what constitutes motive and the strength of instinct and the physiological disposition to enable us to form a decision with certainty. When however we trace an hereditary tendency

to the same weakness displayed in two generations as, *e.g.*, with alcoholism, we begin to doubt whether it was in the man's power to have acted differently. If we are satisfied that it is not the man's fault that his will was not otherwise, it would seem that he cannot rightly be regarded as guilty, and with this remark we must leave this part of the matter, or we shall merely repeat what is said elsewhere concerning Responsibility, Compulsion, and Will.

A protest however must be made against a view that we have seen more than once put forward, *viz.*, that the moral and physical are entirely distinct and you cannot confuse the two, as you are doing when you speak of 'moral insanity.' No doubt this seems a clear distinction to the plain man but in reality it is an illusion: the moral and the physical in the last resort both depend upon the organism. This has been already shown in the organic origin assigned to uncontrollable impulses and is clearly stated by Ribot in the following extracts:—

“ It would be useless to adduce a mass of data and arguments to establish the fact that pleasure and pain depend upon tendencies, which in turn depend upon the organism ..... the agreeable and the disagreeable vary exactly as tendencies do. Where the normal man with normal inclinations will find pleasure, the abnormal man with abnormal inclinations will encounter pain, and *vice versa*. Pleasure and pain follow tendency, as the shadow follows the body. Let us begin with the tendencies connected with the fundamental function of nutrition. Everybody knows of the 'cravings' of pregnancy. As the consequence of poor nutrition in the first months, there are produced digestive, circulatory, and secretory perturbations, which reveal themselves in the form of strange appetites and depraved tastes.....Is it necessary to dwell at length upon the deviations and perversions of the sexual instincts? Here instances abound. Even after making ample allowance for imitation, for wilful debauchery, and for that which comes rather from the head (from the imagination) than from the senses there still remains an abundant harvest. The same conclusion always asserts itself: change the organization, and you will change the tendencies, and moreover

~ The moral and physical not distinct but connected.



you will change the position of pleasure and pain: the latter, accordingly, are but phenomena of indication, or signs to the effect that the necessities of the organisms, whatsoever they be, are satisfied or thwarted.

If it be thought that the inclinations I have just enumerated are of too physiological a nature, I may cite the great group of irresistible impulsions which includes the ungovernable craving for drink, the unconquerable impulse to steal, to practise incendiarism, to kill, to commit suicide. To the consciousness of the individual these impulsions are without cause, without reasonable motives, and that is so because their true cause, the conditions of their genesis are beneath consciousness; it knows only the results of this unconscious work.....These various morbid manifestations....are regarded as symptoms of one and the same cause, namely, "degeneration."(a)

The concluding part of the quotation gives the key to the matter: the cause of moral insanity is beneath consciousness, but that is no ground for refusing to recognize the true character of its effects, which to the unprejudiced mind of the observer of pathological cases must surely appear to be similar in kind to those of recognised forms of insanity.

To the same effect is the conclusion of another well-known writer:—"When the mind undergoes degeneration, the moral feeling is the first to show it, as it is the last to be restored when the disorder passes away; the latest and highest gain of mental evolution, it is the first to witness by its impairment to mental dissolution....In undoing a mental organisation, nature begins by unravelling the finest, most delicate, most intricately woven, and last completed threads of her marvellously complex network. Were the moral sense as old and firmly fixed an instinct as the instinct to walk upright, or the more deeply planted instinct of propagation—as many people in the presumed interests of morality have tried to persuade themselves and others that it is—it would not be the first to suffer in this way when mental degeneration begins; its categorical imperative would not take instant flight at the first assault, but would assert its authority at a later period of

---

(a) Ribot, on Attention, pp. 107—110.



the decline ; but, being the last acquired and the least fixed, it is most likely to vary, not only.....in the pathological way of degeneracy but also.....in physiological ways, according to the diversities of conditions in which it is placed.”(a)

It appears to us that the existence of “moral insanity” would have been admitted long ago, if it had not been for the view that it was a special kind of insanity. To anyone who looks at it in this way its existence not unnaturally appears problematical. The true view is that moral insanity is merely one stage of ordinary insanity or one symptom of it, if that way of putting it is preferred. As so regarded it seems to us to present no difficulties. Thus Dr. Maudsley says that one occasional consequence of descent from an insane stock is an entire absence of the moral sense. Young children, long before they have known what vice meant, have evinced an entire absence of moral feeling with the active display of all sorts of immoral tendencies. He adds that “moral feeling like every other feeling is a function of organization.”(b) Here hereditary insanity is assigned as the cause and it seems simple to admit the existence of this moral disease in such a case if these symptoms accompany ordinary insanity.

Now it is well known that a perversion of the moral sense goes with many forms of insanity. There is often an abrupt and extreme change in moral character after an outbreak of epilepsy : moral insanity is frequently the immediate fore runner of positive mania : it precedes outbreaks of various forms of unequivocal general alienation : it accompanies intellectual insanity in most of its varieties : it may follow other forms of general insanity or epilepsy : it may supervene at puberty or congenital moral imbecility : and it may finally pass into dementia.(c) But if a criminal act is committed at the stage when the outburst of madness has not yet arrived, or if nothing is known of the previous history of the person, the moral insanity appears to stand alone and its con-

---

(a) Maudsley, *Body and Will*, p. 266.

(b) H. Maudsley : *Responsibility in Mental Disease*, pp. 57-8, 64.

(c) *Ib.*, pp. 130-1, 171 *et seq.*, 181-2.

nection with the other form of insanity of which it is really the accompaniment is not recognised. What further contributes to this view is the fallacious idea that moral insanity is put forward as an intellectual derangement only, *viz.*, a defective knowledge of what is right and what is wrong. As already explained this is not correct. Moral insanity is a perversion primarily of the emotions and it is this which perverts the judgment in the manner described in the preceding chapter.(a) This is explicitly stated by Professor Störriing, who says that though certain intellectual anomalies are present, the intellectual is far less marked than the emotional derangement. The recognition of the moral feelings as complex magnitudes which cannot be deranged in isolation, has led some writers to accentuate the intellectual disturbances in a degree which the facts do not warrant. He has observed ethical defect in many patients whose intellectual functions could not possibly be responsible for it. The emotional derangement in moral insanity goes further than merely the moral feelings : the intensity of all reproduced affective states is diminished in these cases, which explains the abnormality of the moral feelings and also why certain intellectual derangements are bound to result. The growth of moral feelings is principally dependent upon the intensity of reproduced affective states.(b)

We should say, therefore, that the scepticism relating to moral insanity is due mainly to the wrong classification of it, suggested by the title. In some cases it is really an ordinary form of insanity the past history of which is not known, while in others it is an early stage of an ordinary form of madness which is not yet recognised because the attendant circumstances necessary for recognition by the plain man are not yet overt. The case is thus necessarily difficult to diagnose, but it becomes less so when it is realised that it is not concerned with the intellect alone, but has a physical basis in the seat of the emotions. The tests to be applied will be known to those accustomed to treat the various forms of insanity.

---

(a) Chapter XI, para. 5.

(b) G. Störriing, O. C., p. 273.



10. We shall conclude our discussion of insanity with some remarks on the reasons why it is so important that lawyers and judges should have some knowledge on this subject. We quite admit that the ordinary judge can hardly equip himself with sufficient information concerning insanity to enable him to decide in the cases that come before him whether the man should be regarded as sane or not sane. For this he must rely usually on the expert evidence of those who have specially studied the subject. There appear, however, to us to be two grounds which render it necessary for him to have some knowledge, namely, (1) that without it he cannot reach a standpoint from which he can understand properly or appraise the expert evidence he records, and (2) that he requires it to enable him to start investigations into the history of some cases, in which madness would not be suspected by a person entirely ignorant of its symptoms.

As to the first point, it is well known that our knowledge of others' minds rests upon an argument from analogy. Men always judge by analogy from their own consciousness and feelings. But this is just what you should not do when treating of the abnormal or pathological mind, and the fact that it is so difficult not to do it has been clearly illustrated in the preceding sections. We have pointed out in several instances, how judges have plainly shown by their utterances that they have been unable to grasp the essential point that you cannot argue with reference to the actions of the insane as though they acted from sane motives or are influenced in the same manner as persons of sound mind. Hence has arisen the conflict between the doctors and the lawyers to which we referred in our second chapter : and the conflict is no less acute between the lawyer and the psychologist. The reason is very simple : you cannot either argue or understand from a basis of pure ignorance, you must start from knowledge of some kind. The only knowledge the lawyer has in this matter is that of normal minds, which here is a false and misleading knowledge. He is not content to sit still and listen to the expert, because he will not put off his own false knowledge, as he is unaware that it is false. Only a study of abnormal minds would teach him this,



and that he has never made. He has, therefore, never reached the point at which he can understand the alienist and constantly disbelieves him because what he says clashes with some false conviction of his own. The case being a unique one in which the ordinary reasonings of common sense fail, some special study is needed to form the necessary basis from which the truth can be grasped.

The second ground is perhaps self-evident, but we desire to try and emphasise it in a few words. One example, which no doubt occurs more commonly than is supposed, is that of epilepsy. The connection of epilepsy with crime is so frequent, that Dr. Maudsley says: "Indeed medical experience teaches that whenever a murder has been committed suddenly, without premeditation, malice or motive, openly and in a way quite different from the way in which murders are commonly done, we ought to search carefully for evidence of previous epilepsy, or should there be no history of epileptic fits, for evidence of an *aura epileptica* and other symptoms allied to epilepsy." (a)

Another case is that of paranoia to which we have already alluded. Referring to this, Dr. Albert Wilson says that it is due to excessive irritability which causes the person afflicted to be quarrelsome. Often such persons have their imagination stirred up with incorrect ideas against persons in position or authority, and will commit murder or some serious crime without much warning. He adds: "It seems to me as if the medical profession did not give paranoia its due in the way of causing crime, and certainly the legal profession do not appreciate it. That undefined quantity—self-control—is supposed to be equal to all delusions or fixed ideas concerning imaginary injuries and injustice, which is quite the opposite of the fact." (b)

We have also given statistics in our second chapter taken from the records of various prisons in England which show that numerous persons are sent to prison who are there discovered to be epileptics and weak-minded. The main reason why persons who are insane are convicted as ordinary criminals and, we

---

(a) Maudsley, O. C., p. 166.

(b) A. Wilson: *Unfinished Man*, pp. 44—6.

believe, in some cases hanged, is that no one sufficiently acquainted with the symptoms of insanity deals with their cases in their early stages. They are simply sent up to the Sessions as ordinary criminals without any evidence being offered as to their state of mind and without their pleading insanity. Even if it strikes the Sessions Judge that there was something abnormal about the crime, he sees that the evidence does not anywhere nearly prove insanity according to the test laid down by the law, and so he hesitates to adjourn the case in order that evidence as to the state of mind of the accused may be searched for. If, however, the Committing Magistrate had knowledge of the symptoms of insanity and suspected it in any case, he would be in a position to make the necessary enquiry and find out the past mental history of the man, whether insanity was set up as a defence or not. At present, in India at all events, such enquiries are rarely made, and practically never in cases other than murder charges.

## CHAPTER XIII.

### HALLUCINATIONS, ILLUSIONS, HYPNOTISM, SLEEP.

Hallucinations and Illusions distinguished—Sensations and Images in Hallucinations—The Physiology of Hallucination—Causes of Hallucination—Artificially-produced Hallucinations—Illusions defined—Their subject-matter and causes—Their limit—Hypnotism—Suggestion explained—Who are liable to Suggestion—Power of Resistance to Hypnotism—Value of the Statements of Persons who have been Hypnotised—Responsibility of the Hypnotic Criminal—Cases and possible cases of crime which may be caused by Hypnotic suggestion—Sleep and Somnambulism.

ALLIED to madness are some forms of hallucinations, our next subject of discussion. But first we must try  
**Hallucinations and Illusions distinguished.** and distinguish them from Illusions, of which we shall speak later, which is not easy to do.

“In ordinary parlance,” says Prof. James, “hallucination is held to differ from illusion in that whilst there is an object really there in illusion, in hallucination there is no objective stimulus at all. We shall presently see that this supposed absence of objective stimulus in hallucination is a mistake, and that hallucinations are often only extremes of the perception process, in which the secondary cerebral re-action is out of all normal proportion to the peripheral stimulus which occasions the activity. Hallucinations usually appear abruptly and have the character of being forced upon the subject. But they possess various degrees of apparent objectivity. One mistake *in limine* must be guarded against. They are often talked of as mental *images* projected outwards by mistake. But where an hallucination is complete, it is much more than a mental image. An hallucination is a strictly sensational form of consciousness, as good and true a sensation as if there were a real object there. The objects happen not to be there, that is all.”(a)

It seems that Professor James would hardly class as real hallucinations what are frequently understood as such; for speaking of pseudo-hallucinations he says that these are milder degree

---

(a) W. James, Principles of Psychology, Vol. II, p. 115.



of hallucination ; they remain always subjective phenomena which the individual regards as sent to him as a sign by God's grace, or as artificially induced by his secret persecutors. They are more vivid, minute, detailed, steady, abrupt and spontaneous than the ordinary images of memory and fancy, and lack the character of objective reality. Such are the ' voices ' which people hear, and which become real hallucinations.(a)

These utterances suggest that no real line can be drawn between the two states, and there is little doubt that this is the case. Thus Professor Sully says : " Illusion and hallucination shade one into the other much too gradually for us to draw any sharp line of demarcation between them. And here we see that hallucination differs from illusion only in the proportion in which the causes are present. When the internal imaginative impulse reaches a certain strength, it becomes self-sufficient or independent of any external impression,"(b) and he instances the case of the insane man who takes any small objects, as pebbles, for gold under the influence of the dominant idea of being a millionaire, where external suggestion can have very little to do with the self-deception. And again " an illusion, it is said, must always have its starting point in some actual impressions, whereas hallucination has no such basis. Thus it is an illusion when a man, under the action of terror, takes a stump of a tree, whitened by the moon's rays, for a ghost. It is a hallucination when an imaginative person so vividly pictures to himself the form of some absent friend that, for the moment, he fancies himself actually beholding him. Illusion is thus a partial displacement of external fact by a fiction of the imagination, while hallucination is a total displacement ;"(c) but he points out that in most hallucinations it is impossible to prove that there is no modicum of external agency co-operating in the production of the effect, *e.g.*, in the case of imagined exterior ' voices ' quoted by Prof. James there are faint impressions in the mad man's ear.

We must not then be taken to deny that most hallucinations have some basis of fact when for convenience of treatment we

---

(a) W. James, *Principles of Psychology*, Vol. II, pp. 115—117.

(b) Sully, *Illusions*, p. 111.

(c) *Ibid.*, pp. 11, 12.

divide them off from illusions, our distinction being simply that in illusions there is more substratum in the shape of a real object, and this is as near as we can go to the popular conception.

The next point to make clear is the relation of hallucinations to sensations and images. Here we must assume some knowledge on the part of the reader of sensations and percepts, as space forbids us to enter into a description of them, and will merely remark, *for the purposes of this discussion*, that, except in the case of organic sensations, both have to do with external objects as their starting point: and we must ask that it be understood that we are excluding from these remarks the apprehension of feelings and our mental states.

“Hallucinations are often described as abnormally intense images which simply by reason of their intensity are mistaken for percepts. But such statement, though supported by very high authority, is almost certainly false, and would probably never have been made if physiological and epistemological considerations had been excluded as they ought to have been. Hallucinations, when carefully examined, seem just as much as percepts to contain among their constituents some primary presentation—either a so-called subjective sensation of sight and hearing or some organic sensation due to deranged circulation or secretion.”(a) The same author then asks “why do we not confound percept and image when what we imagine is imagined as definitely localized and projected? Because we have a contrary percept to give the image the lie; where this fails, as in dreams, or where as in hallucinations the image obtains in other ways the fixity characteristic of impressions, such confusion does in fact result.”(b)

As our object is to show the closeness of hallucination to the normal state, and the consequent difficulty sometimes of detecting it and the danger of being deceived in the matter, either through minimising or over-estimating its importance, we shall also exhibit the relation further from the physiological side.

The Physiology of  
Hallucination.

(a) J. Ward, Art. Psychology, Encyclopædia Britannica, Vol. XX, p. 58.

(b) *Ibid.*



Hallucination is thought to be produced by an excitement of the sensory centres(*a*): it does not result from any lesion of the retina or of the media of visual perception, but it and sensation have the same seat in the brain, and perception and hallucination employ the same class of nervous elements. Hallucination occurs in the centres in which the impressions of the senses are received: we have to do with positive sensation and not with error of judgment. The hallucinatory image acts precisely as a real sensation would do from the point of view of simultaneous contrast, *i.e.*, in producing complementary colours. They correspond with the physiological process, otherwise the same effects of chromatic contrast would not occur in both cases. So again every hallucination of some persistence is succeeded on its disappearance by an after-image, just as in the case of ordinary sensations which affect the retina. Similarly in the mental vision of normal individuals the persistent *idea* of a brilliant colour develops an after-image of the complementary colour, just as a real sensation does.

<sup>1</sup> This shows the close connection which unites sensation, hallucination and memory, which are based on the same physiological operation and are effected in the same region of the nervous centres. Whether it is a real impression of the coloured, or the colour is pictured by the memory, or seen by an hallucination, it is always the same cell which vibrates. The hallucination of a colour is a suggested sensation which occupies the same region of the cerebrum as a real sensation. An hallucination arouses the general sensitiveness of the eye just as it is aroused by waving a real object before the subject's eyes, which proves that hallucination excites the visual centres.(*b*)

Similarly Ribot: "Whereas to the earlier psychologists, an image or idea was a kind of phantom, without definite seat, existing 'within the soul,' differing from perception not in degree but in nature, resembling it 'at most only as a portrait resembles its original;' to physiological psychology, on the contrary, there is between perception and image identity of nature, identity of seat,

---

(*a*) Binet and Féré, *Animal Magnetism*, p. 246. (M. Binet thinks that all hallucinations must start in the periphery, while Prof. James holds that this is not always the case, and that centrally initiated hallucinations can exist.

(*b*) *Ibid.*, pp. 246—262.



and only a difference of degree. The image is not a photograph but a revival of the sensorial and motor elements that have built up the perception. In proportion as its intensity increases, it approaches more and more to the condition of its origination, and so tends to become an hallucination.”(a)

The concluding words show that the hallucination is merely a very vivid mental image, and that such an image is very close to the original sensation.

But we can mark closer the resemblance between the ordinary image and the hallucinatory one by reference to belief. Most psychologists, including, *e.g.*, Dugald Stewart and M. Taine, hold that every image involves a momentary belief in the reality of its object : “ in every image presented to the mind there is, therefore, the germ of an hallucination, which only needs development. Such development occurs in the hypnotic state, in which it is only necessary to name a given object to the subject in order that the image suggested by the experimenter’s words should become an hallucination. Thus there is only a difference of degree between the idea of an object and the hallucination of that object.(b) Further, one hallucinatory image suggests another in virtue of the bond that unites them, just as in ordinary mental life : “ it is not merely the image taken by itself which is externally projected, but the bond of association which unites several images. It is in fact this association which formulates the hallucination ; it produces the successive projection of the images in the order in which they are grouped in the mind.

. . . In reply to the question ‘ what is meant by external projection ? ’ We answer that it is the belief in the reality of a thing. The external projection of an image is, therefore, the belief in its reality. So that, if it is true that we are inclined to make an external projection of the associated images existing in the mind, this implies that we are inclined to believe that things are in reality associated together, just as the images are associated in the mind.”(c) Finally as to perception we may quote M. Taine’s description of external perception as a true hallucination, and M. Binet’s statement that “ it presents on a small scale the phenomena which occur

---

(a) Ribot on Attention, p. 48.

(b) Animal Magnetism, p. 220.

(c) Animal Magnetism, p. 224.

on a large scale in hypnotic hallucination—deviation, duplication, and enlargement of the mental images. Hallucination must, therefore, be a disease of external perception.”(a) It may be noted that hallucinations have far more influence than simple perceptions upon intellectual and volitional process. So far as their content constitutes an affirmation, it is taken as true ; while those that challenge to action, or are in content closely connected with the idea of an action, exercise an unusual compulsion upon the will.(b)

3. Since then hallucination resembles normal states in so many points the reader will not be surprised to hear that according to the statistical researches of E. Gurney about one out of every ten healthy persons has at some time been the subject of hallucination.(c) In the case of sane persons when hallucinations are not brought on by exhaustion or artificial means they have their origin in a preternatural power of imagination :(d) of hallucinations generally the following are the causes as given by Griesinger :—

(1) Local disease of the organ of sense, (2) a state of deep exhaustion either of mind or body, (3) morbid emotional states, *e.g.*, fear, (4) outward calm and stillness between sleeping and waking (*i.e.*, absence of external stimulation), (5) actions of certain poisons, *e.g.*, hashish, opium and belladonna.(e) It would thus seem that hallucination often results from abnormal activity of some kind or other : visualization is hypertrophy of the visual image, and “ those who possess such an intense visualization are half under the influence of hallucination, and it is a hundred to one that the hallucination will some day become complete. We may add that very probably visuals are specially predisposed to hallucination of the sight, and consequently to the forms of delirium of which visual hallucinations are the symptom.”(f) Similarly those are specially subject to hallucination of hearing in whom the auditory images predominate.(g)

---

(a) *Animal Magnetism*, p. 244.

(b) G. Störing, *Mental Pathology and Normal Psychology*, p. 20.

(c) Sully, *Outlines of Psychology*, p. 464, Note 1.

(d) Sully, *Illusions*, p. 117.

(e) *Ibid.*, p. 115.

(f) Binet, *Psychology of Reasoning*, p. 16.

(g) *Ibid.*, p. 23.

It is hoped that the foregoing sketch of hallucinations will enable the reader to understand their nature, and how they are situated with reference to ordinary mental phenomena, and also assist him to look out for the kinds of persons in whom, and the circumstances under which, hallucinations are to be expected. But before leaving the subject we must anticipate to some extent what we shall be again concerned with when speaking of hypnotism and suggestion, and say a few words on artificially produced hallucinations.

4. Assuming that the use of hypnotism should become more widespread than it is at present—concerning which we shall get a clearer idea later—the employment of hypnotic hallucination may easily become of importance in law. A few quotations will make this plain.

“The subject may be induced to mistake the identity of a person, or to accept the presence of one who is really absent and to recognise his features, voice, &c. The possible consequences of this illusion or hallucination are evident. If an unlawful or criminal act should be committed on the subject, or in her presence, an accusation might be made against an innocent person, and it would be maintained with the deepest conviction. The illusion or hallucination might apply to the act itself and would lead to analogous consequences.”(a)

As to hallucinations of memory: “On the other hand retrospective hallucinations, which are really hallucination of the memory, can also be given. It is for instance impressed upon the subject that at a given moment of his past life he witnessed the commission of a crime by an old man living in the same house with him (Bernheim), and, if the suggestion is clearly defined, the subject’s memory will be as intense and as full of details as if the fact had actually occurred. We can see what grave consequences might ensue from these experiments from a medico-legal point of view.”(b) And again: “It is possible that a magistrate or physician may, by the persistence of his questions and his authoritative voice, unconsciously give suggestions which modify the subject’s recollections

(a) *Animal Magnetism*, p. 369.

(b) *Animal Magnetism*, pp. 216-7.



and give rise to hallucinations of memory.”(a) The same would apply to a masterful advocate.

Speaking of the dangers of hypnotism it is said : “ There is still more reason for condemning an enquiry by means of hypnotism. It has been suggested that a suspected or accused person might be hypnotized against his will, in order to obtain from him admissions or information respecting the facts of the accusation. This process, which resembles that of torture, would have the same danger of leading a suspected person to confess crimes of which he is really not guilty,”(b) presumably owing to the force of the suggestions contained in the questions.

It may be thought that the danger is imaginary because the hallucination would disappear when the subject recovered from the hypnotic state, but this is not necessarily so. In subjects affected by profound hypnotism hallucination persists in the waking state, and therefore a conviction of the reality of the hallucination is an essential part of the phenomenon. The hallucination does not consist merely in the external projection of a sensible image, but in the condition of mind which accompanies the projection of this image. Usually no doubt can be infused into the mind of the subject on waking as to the reality of the hallucinatory object, as long as the hallucination remains, though it may be destroyed by suggestion, *i.e.*, by suggesting to him that he has seen or heard nothing. Otherwise the hallucination in time will gradually fade and be spontaneously effaced.

Other modes in which hallucination can be used are, by systematic anæsthesia, *e.g.*, by suggesting to a subject that he is unable to see a given person, by which means a criminal might get rid of a witness ; or again by directing him to forget on awaking what has happened, and he will do so.

This is all we can say at present on hypnotic hallucinations without danger of subsequent repetition : discussion of all other points connected with them must be deferred till later.

---

(a) *Animal Magnetism*, p. 374.

(b) *Animal Magnetism*, p. 375.

5. Illusions have already been partly described when distinguishing them from hallucinations, but they need further definition. In the broadest sense of the term they include not merely what are known as illusions of the senses, but also errors which do not counterfeit actual perception : thus a man is popularly said to be under an illusion when he ridiculously exaggerates his own importance, or pictures the past quite otherwise than it is known to have been. As these illusions like those of the senses simulate the form of immediate or self-evident cognition, Professor Sully widely defines illusion as “ any species of error which counterfeits the form of immediate, self-evident or intuitive knowledge, whether as sense-perception or otherwise ” (a) while his definition for illusion of sense is as follows :—“ An illusion of perception consists in the formation of a quasi-percept which is peculiar to an individual, or which is contradicted by another and presumably more accurate percept ; ” or again, it is “ a deviation from the common or collective experience.” (b)

The distinctive feature about illusions seems to be that the error is not in the sense organ but in the mind : there is a co-operation of the sense and of the mind, but the sensory impressions are correct. They are what they ought to be, the nature of the external excitant and the state of the sensitive organ being given, the error lies in the mind's interpretation of the sensation, (c) or, as Prof. James describes it, “ in every illusion what is false is what is inferred, not what is immediately given. The ‘ this ’ if it were felt by itself alone, would be all right, it only becomes misleading by what it suggests.” (d)

There is the same difficulty in distinguishing illusions from healthy mental life, as in the case of hallucination. Professor Sully says : “ Illusion constitutes a kind of borderland between perfectly sane and vigorous mental life and dementia,” (e) and that it is not essentially an incident in abnormal life, but that hardly any one

---

(a) Sully, *Illusions*, pp. 5, 6.

(b) *Ibid.*, p. 38.

(c) Binet, *Psychology of Reasoning*, pp. 5, 6.

(d) James, *Principles of Psychology*, Vol. II, p. 86.

(e) Sully, *op. cit.*, p. 44.

is always consistently sober and rational in his perceptions and beliefs. "A momentary fatigue of the nerves, a little mental excitement, a relaxation of the effort of attention by which we continually take our bearings with respect to the real world about us, will produce just the same kind of confusion of reality and phantasm which we observe in the insane. To give but an example : the play of fancy which leads to a detection of animal and other forms in clouds is known to be an occupation of the insane, and is rightly made use of by Shakespeare as a mark of incipient mental aberration in Hamlet ; and yet this very same occupation is quite natural to children, and to imaginative adults when they choose to throw the reins on the neck of their phantasy." (a)

Numerous examples showing the like will be given in what follows.

Illusion is concerned with four kinds of immediate knowledge :

The subject-matter and Causes of Illusion. (1) Internal Perception or introspection of the mind's own feelings, (2) External perception, (3) Memory, (4) Belief, including expectations and other kinds of Conviction not included in (1), (2), and (3). (b)

Here we shall be mainly concerned with the first two, as Memory and Belief are treated of elsewhere.

Professor James sums up the causes of illusions under two heads : the wrong object is perceived either because (1) although not on this occasion the real cause, it is yet the habitual inveterate or most probable cause of this, (2) the mind is temporarily full of the thought of that object and therefore ' this ' is peculiarly prone to suggest it at this moment, (c) and with reference to the second cause he says :—" Testimony to personal identity is proverbially fallacious for similar reasons. A man has witnessed a rapid crime or accident, and carries away his mental image. Later he is confronted by a prisoner whom he forthwith perceives in the light of that image, and recognises or ' identifies ' as a participant although he may never have been near the spot." (d)

a) Sully, *op. cit.*, p. 2.

b) *Ibid.*, p. 14.

(c) James, *op. cit.*, Vol. II, p. 86.

(d) *Ibid.*, p. 97.



Wundt expresses it rather differently with reference to assimilation : in those processes of assimilation, he says, which follow directly upon sense-impressions the peripherally excited sensations are so far of influence on the memorial elements that they increase the intensity of the reproduced sensations. When these latter excited by association obtain so exclusive a predominance that the resultant idea is wholly inadequate to the sense-perception, we call it an illusion. In the illusion we imagine we perceive something which is not there, we confuse memorial elements with sense-impressions, and that again is only possible when there is no noticeable difference in the intensity of the two constituents.(a) Other sources of illusion are (1) Inattention to the sense-impression : this leads to a confusion of the impression, and thus the timid man will more readily fall into the illusion of ghost seeing because he is less attentive to the actual impression of the moment.

(2) Error in classifying or identifying a present impression, *e.g.*, a sensation of colour is appreciably modified when there is a strong tendency to regard it in one particular way. Novelty acts as a source of suggestion. We exaggerate the intensity of a new sensation, because being strange it has an exciting character, and being unable to classify it with its like we magnify it. All indistinct impressions again are liable to be wrongly classed, *e.g.*, faint colours, impressions from distant objects, and when we specially attend to them we are apt to magnify them as in the case of vague sensations connected with digestion or respiration.(b) There is a general mental law that when we have to do with the unfrequent, the unimportant and therefore unattended to, and the exceptional, we employ the ordinary, the familiar and the well-known as our standard. Whether we are dealing with sensations that fall below the limits of our mental experience or which arise in some exceptional state of the organism, we carry the habits formed in the much wider region of average everyday perception with us.(c) On this depend various misinterpretations of sense-impressions and conse-

---

(a) Wundt, *Human & Animal Psychology*, p. 289.

(b) Sully, *op. cit.*, p. 40, *et seq.*

(c) *Ibid.*, p. 68.

quent fallacious conclusions, both passive illusions connected with the process of suggestion as, *e.g.*, when the echo of a shout makes us hear two voices because the second auditory impression irresistibly calls up the image of a second shouter, and also active illusions which are connected with an independent process of preperception. Thus a man sees spectres just after exciting his imagination with a ghost story because his mind is predisposed to frame such a percept.

Other instances are the way in which we ignore the limit of our sensibility when it is reached and interpret the impression in the customary way, or we ignore its variation, *e.g.*, taking a room to be brighter than it is when emerging from the dark. An exceptional environment will produce an illusion, *e.g.*, refraction of light, reflection of light and sound, echoes, &c.

There is, however, a limit to illusion, for there is always some real resemblance in it. "Every time that an

**Limit of Illusion.**

illusion lends itself to analysis, it is perceived that the false exteriorized image, which properly speaking constitutes the illusion, in some way resembles that which gives it birth. For example, when by reason of distance or obscurity we take one person for another, or allow ourselves to be deceived by an imperfect resemblance we commit an error of identification: in other words the first image awakened by the external sensations resembles them and is blended with them."(*a*)

There must also be the actual impression: "in normal circumstances an act of imagination, however vivid, cannot create the semblance of a sensation which is altogether absent: it can only slightly modify the actual impression by interfering with that process of comparison and classification which enters into all definite determination of sensational quality."(*b*)

We shall here conclude all that we have to say about illusions now: though some further remarks concerning illusions of introspection, insight and observation will be found elsewhere under the heads of Introspection and Prejudice. We can make no direct applications of what has been said to law, but the considerations must

---

(*a*) Binet, *Psychology of Reasoning*, p. 137.

(*b*) Sully, *op. cit.*, p. 91.



be applied rather, from time to time, in the estimation of evidence as occasion arises. Although much is familiar already to the man of experience and observation, the study of illusions is not wasted, as we are more likely to judge correctly the probability of evidence if we are aware of the ways in which the observer can be deceived and the circumstances under which such deceptions arise.

6. It is an easy transition to Hypnotism, the existence of which we take to be undisputed. It is accepted as a fact in all the more modern psychological works, and if any reader now-a-days is inclined to regard it as humbug and imposture we can only advise him to read *Animal Magnetism*, a work much quoted from in these pages, but we cannot stop to argue with him. For there is nothing really wonderful in hypnotism : the hypnotic subject is not governed by special psychological laws, but the germs of all his symptoms can be traced in the normal state : the physical disturbance also caused by suggestion has many characters in common with the spontaneous disturbance found in an insane person, and the hallucination of hypnotism does not essentially differ from the ordinary forms of hallucination. The phenomena are only an exaggeration and pathological deviation.

The fact that hypnotic patients have displayed extraordinary powers of memory, sensation and discrimination, has tended to give hypnotism an air of the marvellous which has led some people to discredit what they hear of it. Those however who have studied the subject explain this by a simple hypothesis which is known as "the principle of *compensation of functions*, according to which the inhibition of the activity of one region is always connected with an increase in the activity of the other inter-related areas. This inter-relation may be either direct neurodynamic, or indirect, vasomotoric. The first is probably due to the fact that energy which accumulates in one region as the result of inhibition, is discharged through the connecting fibres into other central regions. The second is due to contraction of the capillaries as a result of inhibition, and a compensating dilation of the blood-vessels in other regions. The increased blood supply due to this dilation is in turn attended by an increase in the activity of the region in question. . . . .



In hypnosis it is possible for different regions within the apperception centre itself to be so related that while certain of these regions are partially inhibited, others are correspondingly more open to excitation . . . . in such states of partial hypnosis the subject may carry out in an automatic way complicated acts, all his other functions seeming to be in a waking state. Or he may show certain psychological activities of clearer discrimination, or strikingly exact recognition, or reproduction of certain particular sensations and feelings to the exclusion of all other forms of activity.”(a)

This fact, namely, that hypnotized and hysterical persons show an increased sensitiveness in which perhaps optical oppressions or smells are noticed which the ordinary man cannot perceive, or the memory is abnormally sharpened, is explained similarly by Prof. Munsterberg as due to the nerve paths having become accessible in which the propagation of the excitement was blocked up before. The threshold of excitability changes under various circumstances : cells which respond easily in certain states may need the strongest stimulation in others. Hypnotism by closing the opposite channels and opening wide the channels for the suggested discharge, may stir up excitements for which the physical disposition may have lingered yet which would not have been excited by the normal play of the neurons.(b)

The method of producing the hypnotic state is either by fatiguing the senses or by acting on the imagination. Thus the sense of sight is excited strongly and suddenly by luminous rays, &c., or there is slight and prolonged excitement through fixing the eye on a brilliant object : similarly the sense of hearing is strongly and suddenly excited by some loud noise, or by some slight and prolonged sound like the ticking of a watch. The senses of smell and touch can also be employed, *e.g.*, by pressure, passes, &c. It is not necessary that suggestion should always be present : “a whole series of purely physical agents exist, which prove that sleep can be induced without

---

(a) Wundt, *Outlines of Psychology*, p. 306. The account of hypnotism in the text is practically that of Binet and Féré given in *Animal Magnetism*, except where other authors are specifically quoted.

(b) H. Munsterberg, *Psychotherapy*, pp. 128, 142.

the aid of the subject's imagination, against his will and without his knowledge.''(a)

At the same time these cases are rare, and as it is suggestion that is usually employed it will be well to explain what is meant by this term. Suggestion uses ideas and the subject's intelligence : it consists in introducing, cultivating and confirming an idea in the mind of the subject of the experiment.(b) The states it produces are the results of that mental susceptibility, which we all to some degree possess, of yielding assent to outward suggestion, of affirming that we strongly conceive, and of acting in accordance with what we are made to expect.(c)

Professor James notes that the power of suggestion is insignificant unless the subject is first thrown into the trance-like state, but after that there are no limits to its power : this state has no particular outward symptoms, as the bodily phenomena which are called such are really the products of suggestion, but these suggestions could not have been made successfully without the trance state. However this may be, there are as many forms of suggestion as there are modes of entering into relations with another person. Spoken or written suggestion is the simplest, but gestures can be employed and, though less precise in meaning, suggestion by their means is more intense : several ways can also be combined. In what is known as auto-suggestion the suggestion has its origin in the subject's intelligence : instead of being the result of an external impression, as in the case of verbal suggestion, it results from an internal impression, such as a fixed idea or delirious conception. These are often derived from hallucinations. Again, suggestion may produce either an active or impulsive phenomenon, such as a sensation of pain, an act, &c., or a phenomenon of paralysis, *e.g.*, loss of memory, anæsthesia : there are different psychological explanations of these two states ; in the former association of ideas is used, in the latter it is supposed that the experimenter produces a mental impression which has an inhibitory effect on one of the sensorial or motor functions.

---

a) *Animal Magnetism*, p. 96.

(b) *Ibid.*, p. 184.

c) W. James, *Principles of Psychology*, Vol. II, p. 599.



Unconscious suggestion is almost always in cases of somnambulism—a name given to the state opposed to the lethargic and cataleptic—and occurs when the subject hears something which the experimenter says or sees some preparation which he makes or even remembers a past experiment.

In all kinds of suggestions one idea is made predominant in the subject's mind and there is an absence of all inhibitory influences.

Suggestion to a person awake and in normal health only produces an idea of the phenomenon not the phenomenon itself; to succeed the subject must be either spontaneously or artificially in a morbid state of receptivity. (a) For this the following conditions are required:—(1) the mental inertia of the subject; the field of consciousness must be completely vacant. Then as there is no obstacle—neither the power of arrest nor that of antagonism—the idea suggested dominates the sleeping consciousness, or (2) psychical hyperexcitability causing aptitude for suggestions. If the idea suggested exerts an absolute power over the intelligence, the senses and movements of the hypnotised subject, it is especially due to its intensity. When under the influence of alcohol, haschish, opium, &c., liability is evinced. (b)

With respect to the possibility of influencing normal subjects, the following may be quoted:—“the possibility of making suggestions to normal subjects must, however, be admitted if, as one of the present writers has done, we refer suggestion to the act of attention. When attention is sufficiently intense the period of re-action may disappear, and may even become negative, that is, re-action may precede the excitement. An intense mental representation whether arising spontaneously or induced by suggestion, may therefore produce a re-action irrespective of any excitement.” (c)

Professor James states that “all ages above infancy are probably equally hypnotizable as are all races and both sexes..... native strength or weakness of ‘will’ have absolutely nothing to do with the matter.....Some experts are of opinion that every one is hyp-

---

(a) *Animal Magnetism*, p. 176.

(b) *Ibid.*, p. 177.

(c) *Ibid.*, p. 178, Ch. Féré, *Progrès Médical*, p. 741, 1886.



notizable essentially, the only difficulty being the more habitual presence in some individuals of hindering mental pre-occupations, which, however, may suddenly at some moment be removed.”(a) According to the statistics he quotes a very small percentage of persons are not liable to hypnotization, *e.g.*, 92% are, 700 out of 718 are, and 80% the minimum. Idiots are known to be very difficult to hypnotize, because they have no power of attention.

There seems little doubt that the effect of repetition in hypnotism is very great: the first attempt usually fails, but though the subject declares that he has experienced nothing, the attempt has impressed a permanent modification on his nervous system, which renders subsequent attempts more easy. “We readily admit that artificial sleep may be produced in any subject by repeating, varying and sufficiently prolonging the attempts, so as to induce fatigue.”(b) With those who have been long under treatment the hypnotic sleep is produced with alarming rapidity; a single abrupt gesture, in any place and at any time will sometimes suffice and the subject can be instantaneously awakened. In fifteen seconds a subject has been thrown into lethargy, then into somnambulism, an act suggested, and then awakened. It is also marvellous how readily such persons will grasp the experimenter’s meaning.(c)

Power of resistance  
to Hypnotism.

7. We must next discuss the important point whether a person can be hypnotised without his consent or even against his will.

In the case of a person who has never been hypnotised before the capacity to exercise resistance depends on the individual; it varies with the individual just as muscular force varies. If he is not very susceptible to hypnotism, his consent and even his good will are necessary, but in persons excessively susceptible, resistance is slight and they may be taken by surprise and even receive dangerous suggestions without being put to sleep. The authors of *Animal Magnetism* quote a well-known case of a girl hypnotised by a beggar called Castellon, who left her father in order to follow him, although regarding him with terror and disgust, and remained in his power four days, during which time he outraged his unhappy

(a) James, *op. cit.*, Vol. II, pp. 594-5.

(b) *Animal Magnetism*, p. 100.

(c) *Ibid.*, p. 103.

victim several times.(a) If the subject has been hypnotised, even if he knows that he is to be hypnotised and desires to resist, the resistance will often be in vain ; or if the thing suggested is too repugnant, he may strenuously resist and get nervously excited to the point of an hysterical attack. It is usual to assert as a general proposition that no one can be hypnotised without his knowledge and against his will. This is founded on the fact that the hypnotic power does not lie in the hypnotist but depends on the imagination of the person hypnotised. Thus Professor Munsterberg, after explaining as above, says : “ Thus no one can be hypnotised without his knowledge or against his will. The story of telepathic mysteries which is often before the public is probably always the outcome of a diseased brain.” The effect of this, however, is somewhat weakened by the following addition :—“ To be sure while no one can be hypnotised against his will, many a person is liable to accept suggestions from others and thus to carry out the wishes of others without knowing and certainly without willing that the other mind interfere with the interplay of their own motives.”(b) Similarly, Dr. Hollander, after remarking that fortunately it is almost impossible to hypnotise a person against his will, adds that there are people with certain mental states who might be taken by surprise or taken advantage of under false pretences.(c) This qualification finds support from the three cases quoted by Prof. Munsterberg. A lady being in a nervous and over-fatigued state called in her physician, and, as he bent over her, the sharp sunlight reflected from his eye-glasses struck her eyes. She felt it like a shock, and from that moment her consciousness was split and her remaining half-personality developed a pseudo-memory of its own. In the second case a woman underwent a sudden spiritual “ conversion ” which changed her mental personality : it was found that she had fixed her eyes on the shining brass lamps in a church and went into a trance-like state in which disconnected memories of her early life and of happy times rushed to her consciousness. The third case we referred to in our paragraph on untrue confessions. A man was apparently hyp-

---

(a) Despine, *Etude Scientifique sur le Somnambulisme*, 1880.

(b) Munsterberg : *Psychotherapy*, pp. 370-1.

(c) B. Hollander : *Hypnotism and Suggestion in daily life, education and medical practice*, p. 219.



notised by the flash of steel from a revolver pointed at him : he went off into a kind of trance-like state in which he made a false confession of which on recovery he had no recollection.(a) Now in each of these cases the cause which produced the change in mental state was just such an one as might be employed for the purpose of hypnotising a person, and this, combined with the trance-like state which ensued in each instance, is highly suggestive of hypnotism. But if this be the correct explanation it is clear that three persons were hypnotised without their knowledge and against their will.

It is indubitably possible to hypnotise from a distance, and cases are known in which persons have been hypnotised over the telephone. Prof. Munsterberg states that this is only possible when the person has been previously hypnotised in personal contact: the patient's imagination is then captured by the thought of the hypnotiser. The same result may be effected by a letter from a person who has previously hypnotised the subject.(b) Nevertheless in the *Standard* of December 4th, 1911, will be found a report of a case in which a telephone operator was hypnotised over the wires at a distance of one hundred and thirty miles, although, so far as the report shows, he was not personally acquainted with the hypnotiser. Nor does it appear so certain, as Prof. Munsterberg thinks, that telepathy and hypnotism cannot be combined. There are many well-known cases in which persons have been instructed during hypnosis to make some simple written record or do some other act at some future moment (generally stated in thousands of minutes) and they have carried out the instruction with hardly appreciable error. The awareness of the arrival of the prescribed moment seems only to be accounted for adequately on the hypothesis of subconscious telepathy.(c) It is true, no doubt, that in such cases there has been previous personal contact between the subject and the hypnotiser, but their importance lies in the fact that, even so, they argue a power to give suggestions from a distance without any visible or material means of intercourse with the subject

---

(a) Munsterberg: *Psychology and Crime*, pp. 166—171.

(b) *Ibid.*, pp. 213-4.

(c) W. McDougall: *Body and Mind*, pp. 353-4.



who apparently is influenced without his own knowledge or will.

The point as to whether persons can be hypnotised without their knowledge or will is one of great importance, because, if it is decided in the affirmative, it destroys the force of an argument adverse to the subject drawn from the supposed fact that he must have allowed himself to be hypnotised and had therefore incurred responsibility to society on that account.

One can, by suggesting that certain persons shall never hereafter be able to put a man to sleep, remove him for all future time from hypnotic influences which might be dangerous, (a) or if a fixed idea, *e.g.*, that he will not sleep is artificially developed, it forms an almost complete obstacle, or again the experiment may fail because the operator does not give the order with sufficient authority.

A further question is how much spontaneity exists in the hypnotic state. The subject is capable of reflecting and reasoning and under the influence of suggestion will himself invent expedients which were not suggested to him to carry out the order; also on awaking he imagines his acts were spontaneous and invents reasons of his own for doing them. "Subjects in this condition," says Prof. James "will receive and execute suggestions of crime, and act out a theft, forgery, arson or murder. A girl will believe that she is married to her hypnotiser, &c. It is unfair, however, to say that, in these cases, the subject is a pure puppet with no spontaneity. His spontaneity is certainly not in abeyance so far as things go which are harmoniously associated with the suggestion given him. He takes the text from his operator; but he may amplify and develop it enormously as he acts it out. His spontaneity is lost only for those system of ideas which *conflict* with the suggested delusion. The latter is thus 'systematized' the rest of consciousness is shut off, excluded, dissociated from it. In extreme cases the rest of the mind would seem to be actually abolished and the hypnotic subject to be literally a changed personality." (b)

---

(a) James, *op. cit.*, Vol. II, p. 614.

(b) *Ibid.*, p. 605.

8. As regards the testimony of hypnotised persons as to what happened to them in the hypnotic state, it must first be remarked that after waking the subject is still liable to suggestions, which will last if he has been told that he will still see the object, &c., when awake. Though he remains influenced by the hypnotic suggestion, it appears to him to be spontaneous, and he does not remember how the hallucination was produced, nor who gave him the order, nor even that it was given at all; he will proceed to carry out an act, which he has been told to do, and if asked why he does so, will reply that he does not know or will invent some reason.

Value of the statements of persons who have been hypnotised.

A subject's statement as to the time he has been in the hypnotic sleep can rarely be accepted; he cannot measure the time as he has no landmark. Nor, do the subjects know how often they have been hypnotised, though they sometimes have a general impression about it caused by an impression of cold and shivering. This, however, is not always present and it can be destroyed by suggestion. Sometimes oblivion as to what occurred during the sleeping state is complete, sometimes partial, sometimes the events which occurred during hypnosis recur to the mind with great force, when they are recalled by some external circumstance. No rule can be laid down as there is every variety of case from the most profound oblivion to the most lucid recollection. If the hypnotizer tells the patient that he will remember nothing on awaking, this suggestion will destroy the subject's recollection of all that has occurred; he may even undergo all sorts of violence and have no remembrance of it. The subject who says he remembers everything cannot be trusted; if he find, *e.g.*, that he has a wound he is apt to invent an explanation or accept one given him, but in all cases he ends by suggesting to himself that he saw things as he has explained them. Or again he may err because of the suggestion of the experimenter who has impressed upon him a recollection which is false.

If, however, the subject is hypnotised anew, the recollection of all which occurred during the former hypnosis is then revived, if he has received no special suggestion of oblivion; it has been

shown, however, that subjects while in a hypnotic state are capable of simulation and of suppressing the truth.

It seems to be agreed that persons can be induced by suggestion to give false testimony unintentionally. Dr. Moll states that by the use of retroactive hallucinations they can be made to believe that they have witnessed certain scenes or even crimes. He considers that such hallucinations are analogous to many phenomena of ordinary life, such as the training of witnesses (Lilienthal) and the management of the different parties in a law suit by Counsel (Forel). Bernheim created complete delusions of memory by suggestion without hypnosis, and made people believe that they had witnessed thefts which were purely imaginary. He, therefore, thinks that the suggestibility of a witness should be tried before giving evidence and Forel agrees with this.(a) Similarly Prof. Munsterberg advises that not only should witnesses be examined as to their suggestibility with a view to ascertaining the influence of suggestion on their report of the facts, but also jurymen, as it is a farce if not the evidence but insignificant and accidental circumstances determine the attitude of the suggestible juror.(b) The same advice might, we think, also be applied to the case of some judges.

Further, testimony may be indirectly falsified by suggesting a false premise to the witness at the start: this would colour and pervert his whole evidence.(c) A remarkable instance of the manner in which a suggestion will infect all the neighbouring ideas and emotions and force the whole mental life of the personality under the unnatural influence is given by Prof. Munsterberg.(d) In the case in question the subject made everything which happened and was told her fit in to the suggestion. You cannot, however, really cross-examine a witness in the hypnotic state: it confuses him, and almost inevitably restores him to ordinary consciousness if you persist in arguing with or contradicting him.

The question whether testimony can be obtained from an accused or witnesses in the hypnotic state, which they refuse to give

---

(a) A. Moll: *Hypnotism*, pp. 345—6.

(b) Munsterberg: *Psychology and Crime*, pp. 196—9.

(c) T. J. Hudson: *Psychic Phenomena*, p. 141.

(d) Munsterberg, O. C., pp. 175—9.



when awake, has been much discussed. In the first place, there is the difficulty to be got over of hypnotising them against their will. When this has been surmounted, it is not found generally that the hypnotised person will disclose an important secret, though some of the French writers (Giraud-Teulon, Demarquay and Boismont) report that such cases have occurred. Prof. Munsterberg is of opinion that a criminal who does not confess in his full senses will not yield to hypnotising efforts, and that, even if such hypnotising by force were possible, it is clear that for moral and legal reasons it ought not to be employed. Dr. Hollander doubts whether you would obtain the truth from them in such circumstances, and contests the popular belief that a hypnotised subject will always tell the truth. The question whether it is possible is different from whether it is justifiable, and it seems to us most probable that in some cases at all events people could be got to speak if the suggestion were given them indirectly. Indeed Dr. Moll says that if a falsehood is told them, *e.g.*, that a person is present in whom they would naturally confide, or that someone whom they would not tell is absent, they can be made to speak. He regards it as dangerous, however, because subjects can tell falsehoods while in the hypnotic state; still their statement might give an indication which would prove useful.

We have no doubt that in some cases it would not merely be justifiable but necessary to hypnotise a person in order to obtain his or her statement. It would be so for the purpose of saving an innocent person wrongly accused, and it would be necessary in order to revive the recollection in a case in which it was suspected that a person had been made a victim or instrument of crime while in the trance state. As the law at present stands, there would be some legal difficulties in the way. Thus he could not be sworn, nor could he swear to his statements after waking, nor could it be held that he was in full possession of his mental energies while in the hypnotic state, as in that state a large part of the inner functions are inhibited.<sup>(a)</sup> Whether a confession made by a person under the influence of suggestion would be held

---

(a) Moll, O. C., pp. 347—52; Munsterberg, O. C., pp. 206—8; Hollander, O. C., pp. 218—9.

to be caused by an inducement within the meaning of section 24 of the Indian Evidence Act, is a point which we have not seen discussed. It appears to us that it certainly could not be regarded as voluntary. At the same time confessions by intoxicated persons have been received and their case seems similar. A case is quoted by Goltdammer to have happened at Verona of assault in magnetic sleep in which the Court allowed the person to be re-magnetised, as there was loss of memory in the waking state, and the witness made important statements in the sleep. Such a case might at any time recur, and it seems to us that the law should consider now and either lay down as far as possible what course of conduct should be adopted with reference to the various questions which hypnotism may involve for it, or else except them from the ordinary law of evidence and allow the judges a free hand in their treatment. What will be disastrous is if it does nothing, but attempts to deal with such cases as they occur under the existing provisions of the law which were framed without any contemplation of such matters

9. Next we must speak of hypnotism as a defence and the responsibility of the hypnotic criminal. If a man pleads that he acted under the influence of a suggestion given him while in the hypnotic state it must first be proved by experiment that he is susceptible to hypnotism ; that is, he must display its usual physical phenomena. Thus hallucinative vision is modified by optical instruments like actual vision, motor paralysis produced by suggestion is accompanied by the same physical signs as a paralysis due to organic causes ; so with colour contrasts, &c. A man cannot invent these characteristics as a whole, through want of knowledge and of power ; it has, however, been suggested that possibly the very simulation by giving the subject the idea (*e.g.*, of a paralysis) if sufficiently intense, might produce the same effects as suggestion itself ; for experiments have shown that some subjects can voluntarily create, modify, and destroy effects on themselves comparable to those developed by suggestion.

The accused person who sets up this defence may sometimes be profitably examined at a time when he displays all the physical



characteristics peculiar to the somnambulist state, so that there is no danger of imposture.

“Some of our subjects are aware of the power of suggestion and when absolutely resolved to commit an act for which they fear that their courage or audacity may fail when the moment arrives, they take the precaution of receiving the suggestion from their companions”(a) say the authors of *Animal Magnetism*, and they seem to be further of opinion that where a man is suspected of making a false deposition dictated by hypnotic suggestion, it would be sufficient to prove the fact of the suggestion, as individuals cannot be constrained against their will to submit to hypnotisation, a point which we have discussed above. Or at all events strict enquiry should be made as to why the man consented to be hypnotised, unless this was done suddenly or by force or by guile; for even if he was not aware of the experimenter's purpose, he incurs some responsibility for having voluntarily alienated his free will, much more so if he knew for what criminal act it was proposed to employ him. “It is possible that a subject susceptible to hypnotism might be found in a band of swindlers or murderers who would willingly become the recipient of criminal suggestions. We can readily understand the use of suggestion in such circumstances, since those who act under the influence of hypnotic suggestion display more daring and courage, and even more intelligence than when they act from their own impulse.”(b)

They suggest that though subjects who have been hypnotised without their consent or when taken by surprise and have then received suggestions and commit criminal acts, incur no moral responsibility they are so dangerous to society that they should be treated as insane criminals

It is recognised that hitherto suggestion has been but little employed for criminal practices, but as its uses become better known this need not continue to be so. The writer has some reason to think that a case which came before him in about 1896 may have been really explicable in this way, though he was not then sufficiently acquainted with the subject to suspect it. The charge

---

(a) *Animal Magnetism*, p. 373.

(b) *Ibid.*, pp. 375-6;



as brought by the police was that of administering some stupefying drug to a Shan, by other Shans, and inducing him to gamble away all his money while in a dazed condition; as it could not be proved that any such drug was administered, nor could the complainant recollect taking anything, the case fell through, yet there was evidence to show that the man exhibited the symptoms of what now appears to have been hypnotic trance and seemed to hand over his money without really understanding what he was doing.

10. Dr. Moll quotes the following cases which actually occurred: A doctor assaulted his patient during magnetic sleep. A professional magnetiser assaulted a girl in the magnetic sleep, and the experts gave evidence that a magnetized subject might be assaulted against her will and without her consciousness. The case of the beggar Castellon already referred to. The Levy case in 1879 where a dentist assaulted a girl in the magnetic sleep and was convicted. He also refers to other cases of similar assaults mentioned by Bellanger, Liégeois, Goldammer's archives for 1863, and in F. C. Muller's book *Die Psychopathologie des Bewusstseins* to which we have not been able to obtain access.<sup>(a)</sup> In 1906 an English governess, Miss Lake, was murdered at Essen, and a respectable tradesman named Land confessed to the murder, but was acquitted in spite of the clear account he gave of the circumstances in which the crime was committed. His acquittal was due to independent testimony which plainly established his innocence. It was reported in the "Standard" of December 18th, 1911, that it is now believed that Miss Lake was killed by a man living at Essen, who was since disappeared. This man made a special study of hypnotism and knew Land to be a good subject, and it is thought that he suggested to Land the idea of passing himself off as the murderer.

The same writer suggests as a possible offence that of intentionally causing injury to health by post hypnotic suggestions which may produce all sorts of paralysis and loss of memory. He

(a) A. Moll: *Hypnotism*, 3rd Ed., pp. 335—8.

harm!

also thinks that suicide might be caused if the suggestion were adroitly made, and Prof. Munsterberg is of opinion that a man might suggest to a subject to leave him his property and then commit suicide, and it would be acted on. He states that similar cases have been reported.(a) On the other hand Mr. T. J. Hudson argues that an impulse to suicide would not be obeyed because the instinct of self-preservation would constitute an auto-suggestion which no suggestion could overcome.(b) Similarly the instinct of the mother to preserve her offspring, would prevent criminal abortion being performed on hypnotic suggestion, and he thinks that it is instinct of self-preservation which prevents hypnotised subjects giving away vital secrets. It has been found by experiment that hypnotised subjects will lie in their own defence, and when Lombroso attempted to get a confession from a person proved guilty in the hypnotic state, he elicited the same lies as the man stated when awake.(c) With reference to this argument from instinct, we have to observe that the instinct of self-preservation is not all-powerful, as is shown by the case of the moth which flies to the candle and destroys itself. Further, there are instances of perverted instincts which harm those who display them, anomalies of the sexual instinct, and the instinct which drives some parents to devour their young.(d) In a similar manner Mr. Hudson states that auto-suggestion embraces the habits of thought of the individual and the settled principles and convictions of his whole life, and it is impossible for a hypnotist to impress a suggestion so strongly upon a subject as to cause him to perform an act in violation of the settled principles of his life. From this he draws the conclusion that it is only when the subject is of a criminal character that he will follow the suggestion of a criminal hypnotist and actually perpetrate a crime.(e)

On this very important point there is considerable difference of opinion. Prof. Munsterberg states that "even the most

---

(a) Munsterberg : *Psychology and Crime*, pp. 224-5.

(b) T. J. Hudson : *Psychic Phenomena*, Ed. 1905, pp. 130—5.

(c) Moll, O. C., p. 347.

(d) Metchnikoff : *Prolongation of Life*, p. 129.

(e) Hudson, O. C., pp. 126—30.



deeply hypnotised mind has still the power to resist certain ideas which would be opposed by the deepest maxims of life.”(a) And Dr. Moll says that subjects decline suggestions which offend them or make them ridiculous.(b) Nevertheless he doubts whether they would not accept the suggestions after repeated hypnotization : he quotes Liégeois to the effect that the danger of the commission of such crimes is very great, and Gilles de la Tourette, Pierre Janet and Benedikt as holding the opposite view. It is certain that, according to the experiments, subjects do not always reject criminal suggestion. Thus Liégeois made a girl fire a revolver, which she thought was loaded, at her mother, and another subject put arsenic into the drink of a relation. There are also numerous cases of hypnotic subjects attempting to commit murders with paper daggers and so forth. Those, however, who do not believe in the existence of the danger, say that some trace of consciousness always remains to tell such subjects that they are playing a comedy, and hence they offer a slighter resistance. Further, the subject knows that he is among his friends and relies on the integrity of the hypnotist. We do not share the confidence of those who hold this latter view. One of these, Prof. Munsterberg, appears to us to qualify his opinion considerably when he says :—  
 “ But if we abstract from real crime, we certainly have to acknowledge that actions can be performed which appear in striking contrast with the habits and character of the normal personality, upset his knowledge, and are based on beliefs which would be immediately rejected under ordinary conditions. These higher degrees of hypnotic state are easily followed by complete loss of memory for all that happened during the abnormal state.”(c) This admission seems to us to strike at the root of the contention that an honest man’s opinions and moral sense are sufficient protection to him.

! Even, however, if there is no real risk that persons of honest character can be brought to accept and act on open suggestions to crime, there are still two dangers which seem to us undoubtedly

---

(a) Munsterberg : *Psychology and Crime*, p. 190.

(b) Moll, O. C., pp. 171, 338.

(c) Munsterberg : *Psychotherapy*, pp. 111-2.



grave. In the first place, it appears quite possible that the suggestions might be put to them so as to conceal the fact that they were of a criminal nature, and then there would be no reason to expect that the moral feeling would rise up in revolt. It is stated by Mr. Hudson that a false premise suggested to a hypnotic patient at the outset would colour and pervert his whole testimony,<sup>(a)</sup> and we see no sufficient reason why a man should not be induced similarly to believe that the crime he was committing was a meritorious act. Prof. Munsterberg allows that a man may swear falsely, though believing that he swears the truth, because some one has fabricated an artificial delusion in him, and explains the reason, namely, that here his moral convictions would not rebel as in the case of theft or murder.<sup>(b)</sup> If so, you could clearly cause him to commit a theft if you suggested that the act was a good one by which he was merely restoring property; or likewise with respect to a murder, if you suggested that he was killing a tyrant, or a dangerous anarchist about to murder his king. Dr. Hollander holds this view emphatically. "All the writers," he says, "instance cases in which it was suggested to a patient that the patient should commit a crime as a crime; but this is not the point. The point is that a patient may be made to commit a crime which has been suggested to him as a purely innocent act. The common exhibition of the itinerant mesmerists is to make a patient eat a tallow candle on the suggestion that he is eating a stick of celery, or to drink soap and water under the suggestion that he is drinking beer. Why then, as has been pointed out, might not a butcher cut the throat of a child under the suggestion that he is cutting the throat of a sheep? Why should he not be made to poleaxe a man under the suggestion that he is poleaxing a bullock? Or, to put a more probable and more practical case, why should not a man be induced to sign an important document under the suggestion that he is signing something of a totally different character and of no importance..... I cannot understand authorities on hypnotism declaring, on the one hand, what a wonderful power hypnotism

---

(a) Hudson, O. C., p. 141.

(b) Munsterberg: *Psychology and Crime*, p. 225.

is, and, on the other, that hypnotised subjects can protect themselves against deception.”(a)

The second danger arises from the fact that there are many acts which a person might be induced to do which were in no way criminal, so far as he is concerned, and yet might have disastrous results. Thus Dr. Moll mentions cases of persons being induced hypnotically and post-hypnotically to sign promissory-notes, deeds of gift, etc., to give large donations to societies, and to sign testamentary dispositions.(b) Indirect extortion of money might be effected in this way, a person might be cheated by inducing him to pay the price of real pearls for sham articles, or he might be seriously crippled by buying a house at a high price which was useless to him.(c) In such cases the real criminal could guard against discovery by the use of a post-hypnotic suggestion, that is to say, he would suggest to his subject to forget that he was ever hypnotised. Another effect of a post-hypnotic suggestion is to make the subject believe, on awaking from the hypnotic state, that he is acting of his own accord, and a criminal might take the further precaution, to prevent the person being re-hypnotised in order to revive recollection of what took place during his trance, of adding a suggestion that no one else would be able to hypnotise him. It is stated, however, by Dr. Moll that repeated opposed suggestions in new hypnoses would overcome such a suggestion and also loss of memory occasioned by a post-hypnotic suggestion;(d) he accounts for the fact that hypnotism is not more often used for criminal purposes by knowledge on the part of the experimenter that the loss of memory is only temporary and that the subject may unexpectedly remember the occurrence of earlier hypnoses.

It occurs to us as an interesting point whether it would be an attempt to commit an offence within the meaning of section 511 of the Indian Penal Code if a person caused himself to be hypnotised in order to commit a crime. As the section stands a person

(a) Dr. B. Hollander : *Hypnotism and Suggestion in Daily Life and Medical Practice*, p. 216.

(b) Moll, O. C., p. 337.

(c) Munsterberg, O. C., p. 226.

(d) Moll, O. C., p. 352.

must attempt to commit an offence punishable by the Code with transportation or imprisonment, or to cause such an attempt to be committed, and in such attempt must do an act towards the commission of the offence. The act which he would in this case do would be the submission to the process of hypnotization, but such an act is not in itself necessarily one towards the commission of an offence : to become this it requires the co-operation of a suggestion to be given subsequently and by some one else. [Further, at the time such a suggestion is received the person would no longer be himself, in the sense that he was in full possession of all his mental faculties. The conditions are therefore novel. Similar doubts may arise on the questions of intention and knowledge, for, whatever may have been the intention or knowledge of the person before he was hypnotised, it does not seem possible to hold that his mind is in the same state at the actual time of the commission of the deed. We are not arguing that a person in any of these cases is not worthy of punishment ; but we know the quibbles of the law, and it seems to us quite possible that existing legislation may fail to provide satisfactorily for such cases.

Lastly, if we may venture to offer some advice to advocates, we would say that they would profit considerably by a study of suggestion. Skilful questions in examination are really suggestions, and, as Prof. Munsterberg remarks : “ their influence may set in long before the lawyer of the other side rejects a too clumsy suggestion as an unallowed ‘leading question.’ ” (a) It is also no less important to learn the careful avoidance of opposing suggestions when examining a witness. One should inhibit the desire to say unfavourable things as well as suggest favourable things to say. Further it is useful to remember that some persons are negatively suggestible, *i.e.*, they are inclined to prefer just the opposite of what is suggested to them.

11. It is not unusual to regard the hypnotic state as similar to sleep, but you cannot explain hypnotism by sleep or through it. Prof. Munsterberg suggests that it comes nearer to the process of attention. In

---

(a) Munsterberg, O. C., p. 182.



sleep the brain seems powerless to produce its normal ideas; the associations do not arise; the normal impulses have disappeared and a general ineffectiveness has set in. The brain cells seem unable to function, but we do not know the reason. It may be that a chemical substance poisons the brain during sleep, or the brain cells may be contracted so that the excitement cannot run over from the branches of one nerve cell into those of another: or the blood vessels may be contracted so that an anæmic state makes their normal functions impossible. In hypnotism most of the cell groups remain unaffected: the mind of the subject is open to most ideas, only that is excluded which demands a contrary attitude to that suggested. The dreams in sleep show that unselective awakening of ideas to be expected from a general decrease of functioning. The hypnotic state is characterized by its selective narrowing of consciousness: this selective character is fundamental. The states antagonistic to the beliefs in the suggested ideas are inhibited and cut off. Again, while sleep is characterized by a decrease in sensitiveness and of selective powers, the selective process of hypnotism rather re-inforces sensitiveness and memory in every field which is covered by the suggestive influence.(a)

Somnambulism is not the same as sleep. If not itself a nervous disorder it is closely allied to such  
 Somnambulism.      nervous disorders as epilepsy, catalepsy and hysteria; it indicates a decided neurosis and is the result of distinct nervous troubles.(b) Persons in natural somnambulism often exhibit qualities which they do not possess in the normal state, becoming strong, adroit and good gymnasts. We have referred elsewhere to Dr. Barth's definition of it as "a dream with exaltation of the memory and automatic action of the nervous centres, without voluntary and conscious control." This exaltation of the memory is attributed to somnambulists because of the exact knowledge of places which they appear to display in their nocturnal wanderings, and the way in which they seem to act almost without the aid of their senses. As, however,

---

(a) Munsterberg: *Psychotherapy*, pp. 112—5.

(b) Maudsley: *Responsibility in Mental Disease*, p. 252.

they sometimes perform new acts which they never did before in their own individual lives, Prof. Metchnikoff suggests that such memory must include ancient facts dating perhaps from the pre-human period. He supposes that man has inherited from his ancestors a number of mechanisms of the brain, the activity of which is inhibited by restraints which have been developed later. He thus explains somnambulism as a return to a normal condition which formerly existed; instincts of our pre-human ancestors are awakened which under normal conditions are latent and rudimentary. Hence the gymnastic feats and extraordinary strength of somnambulists.(a) This view was apparently suggested by the instinctive nature of the somnambulist's acts.

It would thus be wrong to class sleep, natural somnambulism and the hypnotic state in one category, and argue from one to the other as though they were the same. We are not aware that the law has laid down any principle as to the manner in which utterances of natural somnambulists and persons in the hypnotic state are to be treated. With regard to sleep we find the following instruction:—

“ But what a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspense of the faculty of judgment may fairly be presumed complete.”(b)

Having regard to the abnormal state of the mind in sleep, as explained above, this direction seems to us correct. We doubt whether such statements could be regarded either as voluntary or trustworthy. If, however, the ground for rejecting such utterances is that the faculty of judgment is suspended, we do not understand why the law admits confessions by a drunken person as evidence against him. In his case similarly we think that what is here called “ the faculty of judgment ” is likewise suspended, a point which will be discussed later in the section on intoxication. The hallucinatory nature of dreams further suggests that the state of sleep is not such that the utterances made during it are likely to be reliable. It cannot be assumed that when the

---

(a) E. Metchnikoff : *The Prolongation of Life*, pp. 205—7.

(b) Ameer Ali and Woodroffe : *Indian Evidence Act*, p. 213.

usual restraints are removed the truth must necessarily be uttered. In this connection perhaps we may cite the fact that in the hypnotic state, where some of the usual restraints are absent, the patient does not always speak the truth.



## CHAPTER XIV.

### IDENTITY—SIMILARITY—COMPARISON OF HANDWRITING— IMITATION.

The expression 'same transaction' in Law—Tests of it as laid down in the decisions unsatisfactory—The nature of Identity discussed—Diversity required in order to be aware of Identity—There is no such thing as sameness generally but we must specify in what respect things are identical or different—We determine this respect according to our practical interest—There is no identity of mere existence but all identity is qualitative—The relation of Similarity to Identity—Ambiguity in the use of the word 'same'—Identification by photographs and portraits—Comparison—Comparison of handwriting—Identification by General knowledge of handwriting—By comparison of two or more writings—To what extent writing is reflex action—The value of such evidence unduly minimised by legal writers—Imitation and the conduct of crowds—Imitation in trade-mark cases.

THERE is a conception of frequent occurrence in law of the meaning of which a clear understanding seems needed. We allude to 'Identity' or 'Sameness,' and in order to ascertain exactly in what it consists it will be necessary at the same time to discuss another conception to which it is intimately related, *viz.*, that of 'Similarity' or 'Likeness.'

It is provided in the Criminal Procedure Code that a number of offences may be tried together at one trial if they were committed in one series of acts so connected together as to form the same transaction: (a) when however an attempt is made to define what the words 'same transaction' mean various tests are suggested and Courts often do not agree as to whether the series of events dealt with did or did not constitute the same transaction. It has been said that it cannot be the same transaction if the alleged offences are separated by distinct intervals of time or place, (b) and again that there must be a causal connection

---

(a) Criminal Procedure Code, s. 235.

(b) Prinsep's Commentary on the Criminal Procedure Code, 13th Edn., p. 237.

between them,(a) but we submit not only that these tests are wrong in themselves, if intended to be used as exclusive tests, but that on the true view of causation, as explained in our chapter on that subject, they are mutually inconsistent. For it is not necessary in order to have the causal relation that the cause should immediately precede the effect, and therefore we may have causality although two events are separated by distinct intervals of time or space or both. This same idea of juxtaposition in time as necessary to constitute the same transaction may be found elsewhere: thus it is said, speaking of the presumption of advancement, that “the advancement of a son even is a mere question of intention. Therefore, facts antecedent to or contemporaneous with the purchase, or *so immediately after it as to constitute a part of the same transaction*, may properly be put in evidence for the purpose of rebutting the presumption....but the acts and declarations of the father subsequent to the purchase, although they may be used in evidence against him by the son, cannot be used by the father against the son.”(b)

Other passages, however, can be cited even in law which do not seem to contemplate such a juxtaposition. With reference to contract and the rule that a past consideration, if given at the request of the promisor, will support a subsequent promise, it is asked in Anson's Law of Contract “Is any limit to be assigned to the time which may elapse between the act done upon request and the promise made in consideration of it?” And the author concludes “that unless the request is virtually an offer of a promise the precise extent of which is hereafter to be ascertained, *or is so clearly made in contemplation of a promise to be given by the maker of the request, that such a promise may be regarded as a part of the same transaction*, the rule in *Lampleigh v. Braithwait* has no application.”(c)

Again s. 6 of the Indian Evidence Act runs: “Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, *whether they occur at*

(a) Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act, p. 133.

(b) Snell, Principles of Equity, 13th Edn., p. 108.

(c) Anson's Law of Contract, 8th Edn., p. 79.

*the same time and place or at different times and places.*" Here it seems to be distinctly contemplated that facts which occurred at different times and places may form part of the same transaction and it is therefore the more surprising that any judge should lay it down that events separated by distinct intervals of time or place do not belong to the same transaction.

"A transaction," says Sir James Stephen, "is a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue," and he goes on to add:—  
 "whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions." (a) Whether the lawyers are still waiting for some principle to be stated for their guidance we do not know, but we are convinced ourselves that no one principle can be used as a test, and that no better rule on the whole can be given than that of Convenience. That is to say that those events are to be regarded as belonging to the same transaction which the Magistrate finds convenient to treat as such for the purpose which he has in hand. Next to this principle we should place motive or similarity of motive, *i.e.*, that all acts done with reference to the same motive, or which serve the same purpose or end of action, may legitimately be regarded as of the same transaction. Thirdly, we should place causal connection, and, fourthly, the contiguity of acts in time and space: there may be others also which have not occurred to us. Why we have adopted this view will become apparent in the discussion of 'Identity' and 'Similarity' which we shall now enter on.

2. In trying to arrive at the nature of Identity we are forced to a certain extent to discuss Metaphysics:  
 The nature of Identity discussed. this is unavoidable, and it is the neglect of what Metaphysics teach which has in our opinion led to the confusion and contradictions on the subject which exist in the law.

---

(a) Stephen, Digest of the Law of Evidence, Art. 3.



We shall begin by insisting on a few propositions: *viz.*, (1) that you cannot be aware of identity unless you have also diversity: (2) that you cannot ask whether a thing is generally the same, but you must confine your questions to a certain aspect of it: (3) that we select that aspect to suit our interests, and such interests are usually practical: (4) that identity or the relation of sameness is ideal, it lies in the view we take of things and not in the nature of things themselves: (5) that the word 'same' is used ambiguously and that it is a different problem when we ask whether an individual remains the same, and when we ask whether two things are the same.

The first proposition applies whether we are speaking of the resemblance of two things or of the continuous identity of one. "In order that the mind may perceive the resemblance between two images," says Binet, "they must differ a little; if they do not, they become added together and form a single image," (a) and similarly Lotze writes "we should know nothing whatever of this fact, the reproduction of a former 'a' by the present A, if the two were simply present with no distinction between them at the same time. To know the present A as repetition of the former 'a,' we must be able to distinguish the two; and we do this because not only does the repeated A bring with it the former one which is the precise counterpart, but this former one also brings with it the ideas c, d, which are associated with it, but not with the present A, and thereby testifies that it has been an object of our perception on some former occasion, but under different circumstances." (b)

To the same effect Prof. Sully writes:—"The visual recognition of a thing as identical with something previously perceived takes place by help of the idea of persistence....(it involves) the comparison of successive impressions and the detection of similarity and diversity of change. Thus a child learns to recognise his hat, &c., by discounting a certain amount of dissimilarity." (c)

---

(a) Binet, *Psychology of Reasoning*, p. 120.

(b) Lotze, *Metaphysic*, Bk. III, Ch. II.

(c) Sully, *Outlines of Psychology*, p. 155.

Let us apply this to the idea of a series, which is closely bound up with the notion of 'same transaction': it is evident that we must have the conception of a succession and of the persistence of something through that succession, and in order that we may say that it remains identical or the same throughout, we must contrast it with the surrounding circumstances which do not persist but change. The question is where this persistence lies, is it in the object or in the mind of the perceiver or in both?

Speaking of succession Mr. Bradley says "without an identity, to which all its members are related, a series is not one, and one is therefore not a series. In fact, the person who denies this unity, is able to do so merely because he covertly supplies it from his own unreflecting mind," and he concludes that there is an actual succession entering into the very apprehension and an actual mental transition: that succession requires both diversity and unity which cannot intelligibly be combined and when we appear to do so, it is only by oscillating from one aspect to the other and not noticing at the time the one to which we are not attending.(a)

If the persistence is in the object itself this implies a sameness of character attaching to the thing itself, *i.e.*, a qualitative sameness, and further the avoidance of any absolute break in its existence: when however it is asked in what the sameness of quality consists, it will be found that no reply can be given, unless the point or particular respect of which you were thinking is specified. A general reply cannot be given because we do not know the general character which is taken to make the thing's essence: it is not always material substance, nor shape, nor size, nor colour. The identity lies really in the view we take of it, and that view is often a mere chance idea: the character therefore lies outside of and beyond the fact taken.(b)

And again, "in enquiries about identity it is all important to be sure of the aspect about which you ask. A thing may be identical or different, accordingly as you look at it:" you must

---

(a) Bradley, *Appearance and Reality*, pp. 49—52.

(b) *Ib.*, pp. 73-4.

ask if a man is identical in this or that respect, for one purpose or another purpose, to speak of General Sameness is meaningless.(a)

How then do we determine in what respect we shall ask of a thing whether it is the same or not? Prof. Stout seems to have answered this question in his remarks on what he calls 'thinghood.' It depends on interest: we take what answer for practical purposes as real, identical, &c.: on the perceptual level this interest is purely practical. It is the interest of the moment which determines how we look at a thing, and we look at it differently according to the fluctuation of interest.(b)

And this is why we say that the rule of convenience is the one to be followed in deciding whether events belong to the same transaction or not. Our interest here is solely as to how we shall dispose judicially of the charges brought against the accused in the most convenient manner, and the considerations which chiefly influence us are whether the same witnesses can speak to all the charges and whether those charges can be kept separate before the mind without risk of confusion or prejudice, if they are taken together. The fact that the events happened at different times and places and such like reasons are irrelevant in themselves save in so far as they hinder or promote our convenience, and in one respect the more distinct the events are in regard to time and place the more easily we can try such charges at one trial, as their very distinctness lessens the risk of confusing them. But to seek to convert such reasons into an objective general test of identity and difference seems to us both meaningless and irrational.

3. The attempt to lay down such tests as the causal connection, continuity in time and space and the like

There is no sameness of mere existence: all identity is qualitative.

is really due to the fallacious idea that you can have identity of mere existence. It is doubtless difficult for the legal mind to grasp it, but it is none the less true that mere existence is a vicious abstraction: all identity is qualitative in the sense that it must consist in content and character,(c) and how that character is determined has already been stated. From this it follows that what

---

(a) Bradley, O. C., pp. 85-6.

(b) Stout, *Manual of Psychology*, pp. 327, *et seq.*

(c) Bradley, *op. cit.*, p. 587.



is identical in quality must always be one, and its division in time or space does not take away its unity. An interval of disappearance is not fatal to its identity, for it is not identical by reason of continuity in time but because its quality has not changed, and the amount of qualitative sameness required is limited by no fixed principle.(a)

And if we attempt to regard breaks in the temporal series as the criterion of identity we are at once faced with the difficulty that we cannot demand absolute continuity in time or space, for common sense refuses to accept such a test and regard as unconnected events separated by insignificant intervals which yet appear to be otherwise related. Nor though we may speak of 'distinct' intervals can we lay down any limit as to what the length of the interval must be, and if we attempt to avoid the difficulty by vaguely saying that the interval must not be too long, having regard to the circumstances of the particular case, apart from the fact that this is merely shirking the point, we have no grounds even for such a statement.

This seems to be the attitude adopted, *e.g.*, in the following passage from Snell's work on Equity; "Also, as regards constructive notice through a man's Solicitor or Counsel, if it is desired by such notice to affect in equity their several principals, the notice must be of something which the Solicitor or Counsel could be reasonably expected both to remember and to mention; and it is commonly said, therefore, that the notice must have been given or imparted to them in the same transaction,—although if one transaction be closely followed by and connected with another, then the second transaction may be considered the same transaction, *if it be reasonable so to consider it.*"(b)

This passage is not very clear: the position is that there are two transactions, and therefore they are not one though described as connected. So long as they remain two how they can be the same, is not intelligible, but apparently on the ground of juxtaposition in time and connection they are to be united in one, if it is reasonable to do so. Such platitudes are useless, what is

---

a) Bradley, pp. 281, 310, 313-4.

(b) Snell, Principles of Equity, 13th Edn., p. 320.

wanted is a statement of what kind of connection is required to justify their combination, or under what circumstances they are considered to be connected. If however by the words 'if it is reasonable to do so,' is practically meant 'if it is convenient for the purpose in hand to regard them as the same transaction,' we then welcome this application of the rule of convenience: in any case we quote the passage because it seems to imply that the test of the identity is the view taken of the events by the judge and not any intrinsic condition of the events themselves.

That the causal relation is sometimes a good test inasmuch as cause and effect can hardly be treated as anything but one transaction, is not denied: but it cannot be adopted as an exclusive test or a necessary condition. As such it would exclude unnecessarily the joinder of charges which under the rule of convenience might well be taken together, and it is further unsatisfactory because as a subjective experience we sometimes cannot trace the direct causal relation, though it may nevertheless be there the whole time, as we may be aware ourselves.

A good instance of a perverse and inconvenient ruling due to a wrong notion of identity is that of *Empress v. Bishnu*.<sup>(a)</sup> In that case three men were charged with theft of certain property and a fourth man with dishonestly receiving the same property, and it was held that they could not be tried at one and the same trial because the two offences were not committed in the same transaction. The judges remarked:—"The offence of dishonestly receiving stolen property from a person who has stolen that property cannot be regarded as an offence committed in the same transaction as the theft itself, unless it be in a case where simultaneously with the offence of theft the offence of receiving stolen property is committed." We doubt whether this decision commends itself to any one but the advocate who is at his wits' end what to say for his client on appeal, but, being based as it is simply on the erroneous ground that identity is equivalent to continuity in time, we would gladly see it dissented from or consigned to oblivion for the future.

---

(a) 1 Calcutta Weekly Notes, p. 35.

4. The relation of Similarity to Identity will now be described. "Similarity," says Mr. Bradley, "is nothing in the world but more or less unspecified sameness." "The feeling that two things are similar need not imply the perception of the identical point, but none the less this feeling is based always on partial sameness," (a) and elsewhere he says that Resemblance is the perception of the more or less unspecified identity of two distinct things. It differs from identity in its lowest form, *i.e.*, where things are taken as the same without specific awareness of the point or sameness and distinction of that from the diversity, because it implies the distinct consciousness that the two things are two and different. It differs again from identity in a more explicit form because it is of the essence of Resemblance that the point or points of sameness should remain at least partly undistinguished and unspecified. And further the feeling which belongs to the experience of similarity is different from that which belongs to the experience of sameness proper. But resemblance is based always on partial sameness, though the specific feeling of resemblance is not itself the partial identity which it involves, and partial identity need not imply likeness proper at all. (b)

The writer is aware that this view is disputed by more than one philosopher: they hold that Resemblance is not based on Identity, but is an ultimate idea, or even that Identity is based on Resemblance. Thus Binet writes, "to explain the resemblance between two states of consciousness by the *common* elements in the two states or by a partial *identity* of their elements, simplifies nothing at all. For it replaces the idea of resemblance by the ideas of identity and unity which are merely its derivatives. Resemblance is a single, ultimate and irreducible idea." (c) Similarly Professor James says "so here any theory that would base likeness on identity, and not rather identity on likeness must fail," again "likeness must not be conceived as a special complication of identity but rather that identity must be conceived as a special

---

(a) Bradley, *op. cit.*, p. 348 and note (1).

(b) *Ib.*, pp. 592-3.

(c) Binet, *op. cit.*, p. 129.



degree of likeness,...likeness and difference are ultimate relations perceived. As a matter of fact no two sensations, no two objects of all those we know, are in scientific rigour identical. We call those of them identical whose difference is unperceived. Over and above this we have a *conception* of absolute sameness, it is true, but this, like so many of our conceptions, is an ideal construction got by following a certain direction of serial increase to its maximum supposable extreme. It plays an important part among other permanent meanings possessed by us in our ideal intellectual constructions. But it plays no part whatever in explaining psychologically how we perceive likenesses between simple things.”(a)

We remember to have read in a judgment of one of the Indian High Courts (unfortunately we cannot now give the reference) that the judges considered the case was not proved because the evidence only established likeness and not identity, and it is no uncommon thing to hear evidence given that a witness can swear that two things or two persons are very like, but he will not swear that they are the same : such testimony is usually considered to fall short of an identification. Now if identity is based on resemblance, what more is required than the assertion that two things are very like ? It is the fact that such questions arise in law that is our excuse for pursuing this controversy concerning Resemblance and Identity a little further. The position of the one side is that Identity is nothing more than a special degree of resemblance with the difference between the two objects unperceived : the contention of the other is that all resemblance is partial identity, but the points of sameness are not fully specified, and that terms such as ‘ exact likeness ’ ‘ precise similarity ’ are misleading. For as soon as you have removed all internal difference, and resemblance is carried to such a point that perceptible difference ceases, then you have identity. As soon as you begin to analyse resemblance you get something else than it, and when you argue from resemblance, what you use is not the resemblance but the point of resemblance, and a point of resemblance is clearly an identity.(b)

---

(a) W. James, *Principles of Psychology*, Vol. I, pp. 532-33.

(b) Bradley, *op. cit.*, p. 595.

The physiological explanation, when one state of consciousness is said to revive a similar state, doubtless is that the two similar states have a numerically single nerve element as their basis: the two images put a common cell element in vibration<sup>(a)</sup> and this is called an identity of seat. This appears to us to point to identity being the ultimate state, but for the purpose of our discussion it seems clear that, what is really the important matter is the amount of difference which is perceived, and we think that in most cases when a witness is able to swear to great likeness between two objects or persons and can specify the points of likeness, in the absence of any specified points of difference it should be accepted as an identification even though the witness shrinks from using that term. If an advocate persists in asking "Will you swear that they are the same?" Many witnesses will answer no, and on paper and to the unreflecting mind this will considerably weaken the effect of the evidence. Such an advocate should be asked in his turn to define what he means by 'same,' and if he attempts to do this it will soon become apparent that his question as so addressed is not one that can be fairly given the direct answer 'yes' or 'no.' If the witness attempts to give any other response he is often charged with prevarication, whereas it is not his fault that he does so, but the form of his interrogator's question compels him to do it. In a case, *e.g.*, of the identification of stolen goods, the Magistrate should not be influenced so much by the use of the words 'like' and 'same,' but should rather get from the witness the points in which he is able to say that the objects correspond and those in which he is able to say that they differ.

"Two objects are similar," says Wundt, "when certain of their characteristics correspond, while others are different," and perfect likeness—to indicate which the term 'identity' is sometimes used—whether of quality or of intensity, must be estimated for practical purposes by indistinguishableness when attention is closely directed to the two objects.<sup>(b)</sup>

---

(a) Binet, *op. cit.*, pp. 125, 126.

(b) Wundt, *Human and Animal Psychology*, p. 291.

5. At the same time it must be remarked that difference is not always fatal to identity, but here we are using  
 Ambiguity in the use of 'same.' 'identity' in another sense. A quotation will explain this: "Real identity," says Dr. Ward, "no more involves exact similarity than exact similarity involves sameness of things; on the contrary we are wont to find the same thing alter with time, so that exact similarity after an interval, so far from suggesting one thing, is often the surest proof that there are two concerned. Of such real identity then, it would seem we must have direct experience; and we have it in the continuous presentation of the bodily self; apart from this it would not be 'generated' by association among changing presentations. Other bodies being in the first instance personified, that then is regarded as one thing from whatever point of view we look at it, whether as part of a larger thing or as itself compounded of such parts—which has had one beginning in time."(a)

The same writer points out the ambiguity in the word "same" whereby it means either individual identity or indistinguishable resemblance: in the former we have mere oneness or singularity which entails no relation, in the latter there is a relation, for two individuals partially coincide.

This individual identity cannot be established solely by qualitative comparison; an *alibi* or a breach of temporal continuity will turn the flank of the strongest argument from resemblance. Moreover resemblance itself may be fatal to identification when the law of being is change.(b)

Similarly Mr. Hobhouse writes that Identity as meaning precise or exact resemblance must not be confused with that kind of identity which we predicate of one thing in two relations, or of one person at different periods of his life. In continuous identity it is a kind of numerical identity that is asserted, and neither does complete resemblance prove continuity nor continuity complete resemblance.(c)

---

(a) J. Ward, Art., Psychology Encyc. Brit., 9th Edn., Vol. XX, pp. 56-7.

(b) *Ibid.*, p. 81.

(c) Hobhouse, Theory of Knowledge, pp. 117—120.



It is hardly necessary to concern ourselves further with this meaning of the term, though we have a few more remarks to make on the subject of Identification. One method of identification allowed in law is by showing the photograph of a person to the witness. "A photographic likeness may often be used for the purpose of identification : this is constantly done in actions for divorce, and has been even allowed in a criminal trial,"(a) and witnesses have also been permitted to identify by a portrait. In the case of *R. v. Tolson*, 4 F. & F., 104, a photograph in a trial for bigamy was shown to two persons to identify on the ground that it was a permanent visible representation of the image made on the minds (the retinas of the eyes) of the witness by the sight of the person represented, so that it was "only another species of the evidence which persons give of identity, when they speak merely from memory."(b)

This reason does not appear to us to be correct : no photograph corresponds entirely to the mental image which we have of a man, but only contains certain elements which are the same. These elements not merely revive those corresponding to them in the image, but they further revive others which do not correspond but which were contiguous with the like ones in the past, and it is this whole often made up of many representations of the individual which is the mental image that we have of the person. It is a case of association of ideas both by similarity and contiguity, and not by similarity alone as the dictum quoted above implies. Hence Prof. Stout when explaining the uncertainty of revival says, "The points of difference in the given presentation pre-occupy consciousness and have preformed associations of their own. The points of identity can only reproduce their contiguous associates by partially or wholly displacing the setting in which they are embedded in the given presentation, and by overcoming the reproductive tendencies which attach to this presentation as a whole and to its specific constituents. In order

---

(a) *Ameer Ali and Woodroffe's 5th Edn. of the Indian Evidence Act*, p. 356, and p. 399, note 7.

(b) *Roscoe, Digest of the Law of Evidence in Criminal Cases*, 9th Edn., p. 146.

that such obstructions may be overcome the points of identity must have peculiar interest or impressiveness, or their preformed association must in some other way be peculiarly favoured, *e.g.*, by frequent repetition, or by the general direction of mental activity at the moment.”(a)

In short the function of photographs, portraits and the like is to call up not any image of the person as seen on one particular occasion but the general idea or generic image that we have in our mind, and how that idea is formed has already been discussed in the Chapter on the theory of the normal man. When therefore in the case of *Fryer v. Gathercole*(b) Parke, B., said “ In the identification of persons you compare in your mind the man you have seen with the man you see at the trial. The same rule of comparison belongs to every species of identification,” the statement does not appear sufficient, for the words ‘ the man you have seen ’ do not adequately describe the nature of the mental image employed. Nor do you compare generally : just as you must ask whether

a man is identical in this or that respect (*vide*  
Comparison. supra, para. 2) so you always compare in some

special respect. Some theoretical or practical end is to be subserved by the comparison which takes place only in regard to the characteristics which happen to be interesting at the moment, other characteristics being set aside or disregarded as unimportant.(c) This explains why persons often fail to observe suspicious facts or draw what appear to be obvious inferences. They do not make the necessary comparisons because they have not the necessary interest at the time : after they have been cheated interest is aroused and in retrospect it looks very different. But judges overlook this and regarding the matter after the event draw the conclusion that the complainant consented, was an accomplice, etc.

6. Comparison of handwriting and identification by it next claims attention. Only two methods will be considered here, *viz.*, that by which an admitted specimen of the person’s handwriting is placed side by side with the handwriting in dispute

Comparison of  
handwriting. Identification by general  
knowledge of.

(a) Stout, *Analytical Psychology*, Vol. I, pp. 277-8.

(b) 13 Jur., 542.

(c) Stout, *Manual of Psychology*, p. 474.



and compared by an expert, the jury, or the judge; and that by which a person who is acquainted with the handwriting of the individual through having seen it on previous occasions, is shown a writing in Court and is asked to say from his general knowledge whether it is or is not that individual's handwriting. The methods are different: in the latter, which will be first discussed, the witness identifies the handwriting by reference to some general standard which exists in his mind. It is this which is alluded to by Best in the following terms:—"A standard of the general nature of the handwriting of the person may be formed in the mind by having, on former occasions, observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. Secondly, a person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his." (a)

It is then said that having seen the party write only once, no matter how long ago, or having merely seen him write his signature, or even only his surname is sufficient to render the evidence admissible: and again, that the number of papers which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the admissibility of the evidence. (b) This is as to the admissibility, but as regards the value of the opinion it would clearly vary very much with the number of papers which the witness had seen in the handwriting of the person, and hence Holroyd, J., is reported to have said in the case of *Sparrow v. Farrant* that in order to make ancient signatures available for the purpose of proving similitude of handwriting, a witness should be produced who is able to swear from his having examined *several* of such signatures, that he has a *sufficient* knowledge of the handwriting to be able, *without an actual comparison*, to state his belief on the subject. (c)

---

(a) Best on Evidence, § 233.

(b) Best on Evidence, §§ 234-5.

(c) Best on Evidence, § 240.



This decision seems to have been so far dissented from in the case of the Fitzwalter peerage<sup>(a)</sup> that Lord Brougham there said that they ought not to allow a person to say from the inspection of the signature to two or three documents that he could prove the handwriting of the party, though a witness was properly allowed to speak to a person's handwriting from inspection of a number of documents with which he had grown familiar from the frequent use of them.<sup>(b)</sup> The point that we are here interested in is, what is this general standard in the mind by means of which the witness is said to recognise a particular handwriting without actual comparison ? By 'actual comparison' we take it to be meant that there is no visual comparison of two specimens present in Court, but there is a comparison with a standard previously created in the mind *ex visu scriptiois* or *ex scriptis olim visis*, as the lawyers say.<sup>(c)</sup>

Difficulties have been made as to refreshing memory in such cases : thus Best writes :—" It has been made a question whether a witness who, either *ex visu scriptiois* or *ex scriptis olim visis*, has acquired the knowledge of the handwriting of a party, but which from length of time, has partly faded from his memory may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at *nisi prius* (*Burr v. Harper*) ; but the correctness of that decision was denied by Patteson, J., in *Doe d. Mudd v. Suckermore* ; and the propriety of the practice may fairly be questioned."<sup>(d)</sup>

The general standard by which the witness recognises the handwriting put before him must, it appears to the writer, be simply the general or universal idea which has already been fully discussed in the chapter on the theory of the normal man. It is in virtue of the common elements existing between the particular writing and the general idea of the handwriting in the witness's mind that the comparison is able to be made. " In comparison," says Prof. Stout, " we first become conscious of the antithesis between the

---

(a) 10 Cl. & F., 193.

(b) Best on Evidence, § 241.

(c) Best on Evidence, §§ 233, 248.

(d) *Ibid.*, § 237.

particular and the universal. The reason is that in it we become aware of the universal, as the common element which connects two clearly distinguished particulars. Thus the common element stands out in contrast to the differences ; whereas in mere recognition no such contrast exists.”(a)

We say the ‘ general idea ’ and do not lay stress on the ‘ generic image ’ because M. Binet has recently doubted the existence of the latter, his view as to thought being expressed as follows :—  
 “ Thought is an unconscious act of the mind which has need of words and images to become fully conscious. But however hard it is to represent to ourselves a thought without the help of words and images, and it is for this reason only that I call it unconscious—it exists none the less, it constitutes, if we would define it by its function, a directive, organising force.”(b) It would, if this be so, be more correct apparently to say that it is in virtue of the general trend or channel of our ideas which is organised by thought on the occasion of each particular experience arising, that we recognise the particular handwriting shown us. It is the neural matter of the brain that is so affected by previous impressions made by the sight of such handwriting in the past that it responds at once to a similar impression now made by the sight of similar handwriting. But whether we speak of the influence of the trend of ideas or of awakening the generic image, it must be evident that the more examples of the handwriting which have been seen in the past the deeper the impression which will have been made, and we cannot understand the ground of the objection to allowing the witness to refresh his memory by reference to a writing admitted to be that of the person.

Perhaps it would more nearly express the nature of this general standard if we employ the term ‘ general impression.’ Concerning these Prof. James says that they seem to be the impulsive results of summation of stimuli ; they come about through the subject dispersing his attention impartially over the whole, surrendering himself to the general look. He thus gets a total effect

---

(a) Stout, *Analytical Psychology*, Vol. II, pp. 174, 175.

(b) A. Binet, *L'Etude Experimentale de l'Intelligence*, p. 108.

in its entirety, which is lost upon the man who is bent on concentration, analysis and emphasis. If the time is too short for the latter it is best to abstain from analysis and be guided by the general look. The person who has the general impression does not give any reason for it, but he *feels* it is so. He is guided by a sum of impressions not one of which is emphatic or distinguished from the rest, not one of which is essential, not one of which is conceived, but all of which together drive him to a conclusion to which nothing but *that* sum total leads. The man however by seeking to make some one impression characteristic and essential, prevents the rest from having their effect.(a)

This remarkable passage is capable of many applications in law and is alluded to elsewhere in this work : it is cited here to assist in showing what the nature of the standard is and to make it plain that it is idle to cross-examine a witness on the nature or composition of his general impression of a man's handwriting. From it we can also understand why the witness is able to give an opinion as to resemblance, for it was found that it was essential for the perception of resemblance, that there should be sameness in the two things but that the points of the sameness should be partly undistinguished and unspecified (para. 4) : and this appears to be exactly the basis of this species of identification. This kind of evidence, whatever doubts there may be about its admissibility in English law,(b) is explicitly provided for by s. 47 of the Indian Evidence Act.

7. In the other method, which is prescribed in ss. 45 and 73 of the same Act, two or more writings are compared, and sometimes the opinion of an expert in handwriting is taken on them. What is important here is distinctness of the ground of comparison or common factor : " In comparing two complex presentations," says Prof. Sully, " there is a further difficulty due to the need of a preliminary analysis, the discrimination and selection of the ground of comparison. It is found that the difficulty in this case varies inversely with the prominence of the element. By prominence

By comparison of  
two writings.

---

(a) James, *op cit.*, Vol. II, pp. 350, 351, note.

(b) See Best, § 246.



is here meant its impressiveness relatively to that of the other elements. Thus it is difficult to compare two handwritings, two musical styles and so on, in respect of some subtle feature that is apt to be overpowered by more palpable and striking traits.”(a)

A difference in opinion of two persons concerning the identity of the handwriting on two papers may often be accounted for by the fact that one has a special aptitude for noticing likenesses and the other for noting differences, and the practised aptitude of each will further the detection of that relation.(b) It is said, however, that more weight should be given to evidence of similitude than to that of dissimilitude, because it requires great skill to imitate handwriting especially for several lines, while dissimilitude may be occasioned by a variety of circumstances, such as the health and spirits of the writer, the care used, the pen, ink, etc.(c) But there is another reason given which requires examination.

“ Handwriting, notwithstanding it may be artificial, is always in some degree the reflex of the nervous organisation of the writer. Hence there is in each person’s handwriting some distinctive characteristic, which as being the reflex of his nervous organisation, is necessarily independent of his own will, and unconsciously forces the writer to stamp the writing as his own. Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship; that the tendency to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen and the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen.”(d)

Whatever writing may be in the adult it certainly was not reflex-action in the child, but much that originally required conscious effort with practice becomes automatic and mechanical

---

(a) Sully, *Outlines of Psychology*, p. 248.

(b) *Ibid.*, p. 250.

(c) Lawson’s *Expert Ev.*, 278.

(d) Rogers on *Expert Testimony*, 291, 292, quoted on p. 407 of Ameer Ali and Woodroffe’s work.

and, with this qualification, we do not object to the description. Ribot, however, distinguishes writing from reflex-movements proper, and the following quotation will show to what extent:—  
 “ Reflex-movements, whether reflex-action proper, natural and innate, or reflex-actions that are acquired, secondary and fixed by repetition and habit, are produced without volition, hesitation or effort, and may continue a long time without fatigue. They call into action in the organism only those elements necessary to their effectuation, while their adaptation to ends is perfect. In the strictly motor order of things, they are the equivalent of spontaneous attention, which similarly is an intellectual reflex-action that presupposes neither choice nor hesitation, nor effort, and may likewise continue a long time without fatigue. But there are other classes of movements that are more complex and artificial; as for instance, writing, dancing, fencing, all bodily exercises and all mechanical handicrafts. In these instances adaptation is no longer natural but laboriously acquired. It demands the exercise of choice, repeated endeavour, effort, and at the outset is accompanied by great fatigue.”(a)

It seems necessary to try and determine to what extent writing is reflex and to what extent it can be modified by will, for it is apparent that, if the claim of the experts in caligraphy is really correct, considerably more importance should be attached to evidence of handwriting than is usually done. It is a test of automatic actions that they do not involve attention, but are fixed and uniform responses to the fixed and uniform recurrence of similar modes of stimulation.(b) Now it appears to us that it would be untrue to say that writing does not involve attention; though the attention given is not a close one, it is to a certain extent controlled by vision and we soon become aware of this if we try to write in the dark. Practice dispenses with that close attention to the detailed elements of the composite train which was necessary at first and so the sensory elements become indistinct as compared with the motor ones, and the final results of the repetition is a habitual or quasi-automatic action in which all the psychical

---

(a) Ribot on Attention, p. 57.

(b) Stout, *op. cit.*, Vol. I, pp. 199, 200

elements, presentations and representations alike become indistinct.(a) We do not believe, however, that the movements become so independent of the will that in forging or deliberately disguising the handwriting, where attention is pre-eminently displayed, the attention would not be likely to counteract the effects of habit. It was found in the course of hypnotic experiments that “certain acts which are not purely mechanical cannot be suggested merely by the presence of the instrument which effects them. The act of writing, for instance, not only involves the exercise of the hand which traces the characters, but of the thought which co-ordinates the words in a given sentence.” But when words and sentences were dictated to the patient holding the pen he could be induced to write, though the writing was often irregular : if care was taken about the position of the hand, an autograph can be obtained like those which are written in the waking state.(b)

It may perhaps be remarked that the conclusions drawn by writers on evidence are not in accordance with the opinions of the experts. Best says :—“Whatever may be the relative values of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous ;” and again “standing alone any of the modes of proof of handwriting by resemblance are worth little ; in a criminal case nothing,—their real value being as adminicula of testimony.”(c) Ameer Ali and Woodroffe, after stating that a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison, proceed to assert that “many men are capable of writing in several different hands ; and consequently where the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the Court genuine documents which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute. A comparison of writings, therefore, for these and other reasons is a mode of ascertaining the truth which ought to be used with very great caution,

---

(a) Sully, *op. cit.*, pp. 188-89.

(b) Binet and Féré, *Animal Magnetism*, p. 282.

(c) Best on Evidence, § 247.



especially if no skilled witness has been called to make the comparison.”(a)

This of course is attributing to mankind just the power which the experts on the subject say they have not got, and such assertions are probably too sweeping: in any case where there is no reason to suppose that one of the writings has been intentionally disguised, evidence as to resemblance of the handwriting is often too striking to be treated in this manner, and opinions such as those quoted seem to be based on the undue prominence which has been accorded to a few cases of mistaken identity of this description.

8. Under the head of imitation we propose to treat the conduct of crowds, though it is also intimately concerned with suggestion. It is said by the commentators under the head of “Physical presumptions”:—“It may also be assumed that animals as a general rule act in conformity with their nature;.....Similar presumptions may be made as to the conduct of men in masses, such as that persons in fright will act instinctively and convulsively.”(b) This appears to imply that masses of men act differently from individuals, and we do not think that this will be disputed. Examples such as the conduct of the members of the London Stock Exchange on the occasion of the relief of Mafeking, of an American crowd lynching negroes, of a rush in a theatre when an alarm of fire is raised, etc., certainly confirm the statement in the text. In about December, 1911, a case was reported in the “Standard,” somewhere in Hungary, we think, in which a crowd lynched some persons, and, when some of the delinquents were tried for murder, they were acquitted on the ground that they had hypnotised one another and were acting under the influence of suggestion and were not responsible. This decision was condemned, and we propose to examine psychologically the nature of such cases.

The difference in the conduct of persons when acting separately and together appears to be due mainly to the influence in the latter case of suggestion and imitation. In these instances

---

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 509.

(b) *Ibid.*, p. 731.

the crowd always acts under the spur of some strong emotion such as fright, joy, or anger, and it is well known that emotion increases suggestibility. It gives to the impression and the idea the power to overwhelm the opposite idea which otherwise might have influenced our deliberation. Thus Prof. Munsterberg says :—" Emotion changes the man ; during a panic the suggestibility is reinforced to a degree where all resistance seems to be broken down, and to be a member of a crowd is always sufficient to weaken the counter-action." (a) It is not uncommon to hear persons who act in masses described as hypnotised or like hypnotised people, even by scientific men. Thus Prof. Metchnikoff writes :—" As our anthropoid ancestors and primitive men live in tribes, it is natural that when men are grouped together, certain savage instincts should awaken. . . . . When man is surrounded by a great many of his fellows, he becomes particularly responsive to suggestion." He then quotes G. Le Bon that an individual immersed for some time in a crowd in action, either on account of the magnetic influence given out by the crowd or from some other cause, finds himself in a special state, which much resembles the state of fascination in which the hypnotised individual finds himself in the hands of the hypnotiser. The activity of the brain is paralysed in the case of the hypnotised, will and discernment are lost. Man under the influence of a crowd gets into a condition like that of a hysterical patient, and displays a state of mind identical with that of our ancestors. He becomes a barbarian, a creature acting by instinct. (b)

It appears, then, that men in a crowd revert more or less to the gregarious animal and so exhibit the power of imitation. Experimental psychology has shown the enormous effect of imitation. This consciousness of imitation has reinforced the energy of the impulse beyond any point which the will could have reached. The impressive demonstration of an action gives to the impulse of the imitating mind the maximum of force : it must therefore

---

(a) Munsterberg : *Psychology and Crime*, p. 195 ; *Psychotherapy*, p. 88.

(b) E. Metchnikoff : *Prolongation of Life*, pp. 209-10.

be one condition under which it is most difficult to inhibit the impulse. (a) In the case of a crowd it is gesture that plays the greatest part in imitation. "Gesture," says Prof. Mantegazza, "is more automatic than speech and automatically induces imitation. Of this we may convince ourselves by suddenly opening an umbrella in the middle of the street when the weather is uncertain, yet without actual rain, or by putting the hand into the pocket in an omnibus as though to pay the fare. Many umbrellas will be opened and many persons will draw out their pence by the simple force of automatic imitation." He adds: "If we do not always keep in mind the sympathetic automatism of many gestures, we shall never understand one half of the expression of the emotions." (b) Imitation is regarded as an instinct by Prof. James and other writers, and, though Mr. McDougall does not agree that there is a special instinct of imitation, he accounts for the responses of primitive sympathy, which are outwardly imitative actions, as special adaptations of principal instinctive dispositions on their sensory sides. He says that imitative actions of this sort are displayed on a great scale by crowds of human beings and are the principal source of the wild excesses of crowds. Speaking of "Imitation" as including suggestion, sympathy and imitation as viewed from the side of the patient, he writes: "Imitation is the prime condition of all collective mental life. When men feel, act or think as members of a group of any kind—whether a mere mob, a committee, a political or religious association, a city, a nation, or any other social aggregate—their collective actions show that the mental processes of each man have been profoundly modified in virtue of the fact that he thought, felt and acted as one of a group and in reciprocal mental action with the other members of the group, as a whole. In the simpler forms of social grouping, imitation is the principal condition of this profound alteration of the individual's mental process. And even in the most developed forms of social aggregation, it plays a fundamental part (although greatly complicated by other factors) in rendering possible the

---

(a) Munsterberg: *Psychology and Crime*, pp. 248-50.

(b) P. Mantegazza: *Physiognomy and Expression*, pp. 84, 86.



existence and operation of the collective mind, its collective deliberation, emotion, character and volition.”(a)

Now we think that there is always a feeling that an individual who commits a criminal act as a member of a crowd is less blameworthy than if he committed that act alone. If a hundred persons together lynched a man it is hardly conceivable that anyone would wish to hang the hundred men as guilty of murder. It is true that the Indian Penal Code (Section 149) makes every member of an unlawful assembly guilty of any offence committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, but we have not heard of a case in which a whole assembly has been so treated. The popular feeling is perhaps to throw the blame on one or two individuals as leaders and punish the rest leniently as instruments. This, however, in itself assumes that the majority have not used their own judgment and have acted in some way differently from the few who have. Why this should be so is, we think, clear from the psychological descriptions of suggestion and imitation which we have given. What we are doubtful about is whether it is right to exempt the so-called leaders from the same leniency. As far as we can judge they have also been influenced by the increased suggestion and feeling of sympathy which resulted from the existence of the crowd and the heightened emotion which animated a mass of such human beings. That it is proposed to treat them as if these conditions did not exist in their case, appears to us to spring from lack of imagination on the part of those who judge them after the event under entirely different circumstances. The psychological conclusion is clear that the mental condition of all the members of a crowd is modified by the fact that they act and think in a group. Nor does it seem to us that it could rightly be argued that the fact that some men were ringleaders showed that they had retained their power of judgment whatever the condition of the others may have been. On the contrary, we think that the ringleaders would probably be those whom the

---

(a) W. McDougall: *An Introduction to Social Psychology*, pp. 89, 103-4, 326-7.

emotion affected most violently and therefore impelled to act first : it could hardly be said that in such circumstances they acted less from instinct and more by reason than the others. Nor is it a case of the majority acting under the orders of a few, as the power which moves the majority of the crowd is in the main automatic imitation, which is different from obedience to a command.

We should therefore say that the case is one which needs special treatment, and that such treatment should be based on a recognition of the true mental state of all those who compose the crowd. An attempt to provide for it, as the law now does, by ignoring the modification of the mental processes of the individuals who make up the group, and holding them responsible to just the same extent as if each one had acted separately for himself alone, cannot be satisfactory. It is not in accordance with the facts and errs on the side of severity, and the certain result will be that the provisions of the law will be evaded or its language strained so as to produce acquittals, as in the case referred to in Hungary, or as usually occurs when people are brought to trial for lynching in America.

9. It has been suggested that experimental psychology might be utilised in the decision of trade-mark cases which are concerned with imitation. The matter really depends on recognition which is a psychological subject.(a) At present the law does not attempt to lay down any standard by which to judge whether a trade-mark has been imitated or not or to a degree which should not be allowed. In India the matter is dealt with under the Indian Merchandise Marks Act of 1889, which makes punishable the counterfeiting of a trade-mark or property-mark used by another, the selling of goods marked with a counterfeit trade-mark or property-mark, the application of a false trade-description to goods, etc. In the last-named offence is included the application of a " false name " or " initials " to goods being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having

---

(a) H. Munsterberg : Problems of To-day, pp. 171-3.



authorized the use of such name or initials. In his commentary on these sections, Mr. J. D. Mayne<sup>(a)</sup> states that “the intention to defraud will be judged according to the effect that the representation, however conveyed, or whatever form it will assume, will be likely to produce. This, again, will depend largely upon the class of persons to whom it is addressed. Where the persons likely to be influenced judge mainly by the eye, a similarity of device will be more important than any amount of countervailing written matter, which would probably not be understood. So also persons unaccustomed to a critical examination of written documents, may be easily taken in by marked similarity of description, without looking at minor statements which may alter its effect.” He quotes the ruling of Kekewich, J., in the case of *Soslehuer v. Appollineris Co.* (1897), as follows:—“If the defendant’s goods on the face of them, and having regard to surrounding circumstances are calculated to deceive, it seems to me that no evidence is required to prove the intention to deceive, nor ought time and money to be expended on any such evidence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive.” Further comments are, that “where the imitation is not actual but constructive . . . . the Crown must prove that it was reasonably calculated to produce a false belief. Not that it might be taken for another mark or description, but that in all fair probability it would be taken for it:” again, with reference to the offence of counterfeiting a trade-mark or property mark, “the imitation need not be exact, but it must be intended to represent the very thing which is imitated, and not merely a completely different thing, which an ignorant person might mistake for it.”

The drawback to these rulings and comments is that they necessarily allow such scope to individual opinions and personal estimates that it is difficult to judge beforehand what view will be

---

(a) J. D. Mayne : *The Criminal Law of India*, 3rd Ed., pp. 833—5.



taken of a case. If it were possible to look at the matter more objectively and obtain some kind of standard based on experiment, much of this uncertainty would disappear. That the present position is unsatisfactory may be gathered from the following passage of Prof. Munsterberg's work already quoted:—"Every one who studies the Court Cases in restraint of trade becomes impressed with the looseness and vagueness of the legal ideas involved. There seems nowhere a definite standard. In buying his favourite article the purchaser is sometimes expected to exert the sharpest attention in order not to be deceived by an imitation. In other cases, the Court seems to consider the purchaser as the most careless, stupid person, who can be tricked by any superficial similarity. The evidence of the trade-witness is an entirely unreliable, arbitrary factor. The so-called ordinary purchaser changes his mental qualities with every judge, and it seems impossible to foresee whether a certain label will be construed as an unallowed imitation of the other, or as a similar but independent trade-mark."

He then gives a list of a number of articles which he had collected, in which the similarity of form or colour or name or packing had been used in a conscious way in order to profit from the reputation of another article which had won its popularity by quality or by advertisement. He states that in such cases there would be no difficulty in producing in the psychological laboratory conditions under which the mental principles involved could be repeated and brought under exact observation. "The experiment would determine the degree of difficulty or ease with which the recognition of a certain impression can be secured. As soon as such a scale of the degrees of attention were gained, we could have an objective standard and could determine whether or not too much attention was needed to distinguish an imitation from the original."

This suggestion seems to us a very interesting one. It is well known that some minds are quicker at seeing differences and others at seeing likenesses, and it is therefore unsatisfactory that a judgment should be based on the single opinion of a judge as to the degree of likeness involved. An experiment in recognition

conducted on the lines suggested by Prof. Munsterberg would certainly, we think, be an aid to the Court in coming to its decision. The suggestion might also be utilised in any kind of case in which counterfeiting is involved : for example, it would assist to judge whether a person charged with delivering a counterfeit coin to another knowing it to be counterfeit, or being found in possession of such coin, really knew that the coin was false or not. Likewise in cases of selling and possessing counterfeit Government stamps for revenue and postal purposes, using as genuine counterfeit currency-notes and possibly some cases of using forged documents. Whenever the degree of imitation and the probability of recognition is the problem to be considered, it seems to us clear that psychology should be able to give assistance to the Courts.

## CHAPTER XV.

### RESPONSIBILITY—PUNISHMENT—JUSTICE.

Responsibility—Legal and moral responsibility not identical—Necessity of considering moral responsibility—In what it consists—Compulsion—Legal responsibility in cases of intoxication—Unsatisfactory nature of the treatment of intoxication in the Indian Criminal law—Psychological description of the state of alcoholism—The test of responsibility in cases of alleged insanity—Moral insanity—Hereditary nature of vicious tendencies—Necessity of some alteration in the present legal classification of criminals.

Punishment—Its objects—The retributive, reformatory and deterrent character of punishment—To what extent the legal view of punishment is founded on each—The preventive sections of the Criminal Procedure Code a measure for the protection of society and nothing else and cannot be justified—Neither can the severe sentences passed for cattle and boat stealing and for offences against the Opium and Excise laws—Inhuman sentences on so-called hardened criminals similarly cannot be defended—Psychological view of the effect of long sentences of imprisonment—The right of society to protect itself at any cost to the individual exaggerated—Punishment must be founded on the notions of Responsibility and Justice, and must not be inflicted contrary to the sentiment of the people.

THE subject of Responsibility is referred to in the Chapters on Intention, Insanity and Hypnotism, here it is proposed to give a more general account of it.

Legal and Moral  
Responsibility.

Legal and moral responsibility, we are aware, do not always coincide. The legal presumption is that no one can plead ignorance of the law, while it is of the essence of moral responsibility that there shall be knowledge of right and wrong: none the less we cannot on this account avoid some discussion of moral responsibility. For whenever it has to be decided whether a man was of sound mind, or when a special intention is required on the part of the doer in order to constitute some particular offence there the question of knowledge cannot be excluded.

This seems to be admitted by the legal writers themselves, and such of them as hold the theory—which we have had occasion to criticise elsewhere—that the question of intention is the question of knowledge, will, if they are logical, have to admit that they



must consider this point in almost every criminal case: and further, even those who would deny the necessity of proving knowledge in order to impute guilt will allow that the degree of knowledge must make some difference to the degree of guilt imputed.

The popular view of responsibility, which is akin to the moral one, is that a man is only responsible for that which he wills, and that only is regarded as a real volition which appears to

**Moral Responsibility.** be an expression of the man's self. It has, however, to be remembered that the man's self is his permanent disposition which has been formed as the result of his past thoughts and acts, and so, if analysis be carried further, the question becomes to what extent a man has made this standing will.

"The question is," says Mr. Bradley, "can the man say 'It is not my doing that my will for good is not stronger. It is not my doing that solicitation to bad is not weaker'? Can he say 'What energy was in me has, so far as my power went, been made one with good and withdrawn from bad. My standing will, for which volition was not possible, was in this respect not of my own making?' If a man can truly say this, then he may also say 'I did not have a volition because I could not; and therefore am not responsible for the act, because not responsible for the will. No man can be tempted except by his own will; and the point is, is it his fault that his will is not otherwise? If that is not his fault, then we admit that he was overborne, that volition was really impossible; and we think that to him as a moral agent, the deed is not imputable.'" And again, "But where we collect ourselves and volition does take place, I think we must say that, given knowledge there is always imputation." (a)

For responsibility then you must be able to say that the doer has had both the knowledge of how to act and the power to act in one of two ways, or either to act or abstain from acting: and as regards this power the writer quoted above, distinguishes absolute from relative

compulsion. Absolute compulsion is the production in a man of a state of mind or body without his actual will and against his actual or presumable will: relative compulsion is when I cause another to believe that in the case of a certain event taking (or not taking) place, a certain state against his will, will be produced in him through my agency. It is a threat of absolute compulsion, and does not relieve from responsibility: it is a 'must' only in case I make up my mind to have this, or decide that I cannot face that.(a)

The important matter of the necessity of self-consciousness in volition has been discussed in the chapter on Intention, and we shall therefore merely repeat the conclusion here that all morality is not necessarily self-conscious. After we have formed our standing will, we are answerable for acts of will not self-conscious, because we now know their character and ought to have them under control. In many moral actions we act from habit and without reflection, but the formation of these habits has been by acts of conscious volition, and these habits themselves constitute, at all events in great part, our standing will. Our character formed by habit is the present state of our will, and though we may not be fully aware of its nature, yet morally it makes us what we are.(b)

*Degrees of Responsibility.*—The popular view of responsibility however does not sufficiently regard the fact that degrees of responsibility exist. "Human responsibility," says the same writer "is not a thing which is simple and absolute. It is not a question which you can bring bodily under one head and decide unconditionally by some plain issue between Yes and No. It is, on the contrary, if taken as a whole, an affair of less and more, and it is in the main a matter of degree. And not being simple, it cannot be dealt with by any one simple criterion, but must be estimated, as we have seen, by several principles of value. It is indefensible to insist that I am absolutely accountable for all that has issued from my will, and am accountable for

---

(a) F. H. Bradley, *Ethical Studies*, pp. 44-5.

(b) *Ib.*, pp. 218-19.

nothing else whatever.”(a) He then points out that the law must necessarily fail here: it must regard a man as mad or not mad, even though it is well known that moral responsibility exists among the insane in varying degrees. It must make a clean division for legal purposes and apply its hard distinctions in individual cases by ignoring what refuses to square with them. This, of course, must inevitably cause some injustice, and it is therefore the more necessary to consider whether the principles which the law applies are really the best that could be adopted, or whether they might not with advantage be modified at all events in some respects. ✓

2. We shall now consider the legal view of responsibility taken in cases of intoxication. Section 86 of the Indian Penal Code enacts that “In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.”

It should be noted that this section impliedly fastens on knowledge as a condition requisite for responsibility: the fact that special legislation is needed to impute knowledge to the doer practically concedes two things, *viz.*, that knowledge is necessary for responsibility, and that in intoxication a man has not the requisite knowledge. In the first respect it is at one with the moral view, in the second it runs counter at all events to the popular view of moral responsibility by attributing knowledge where it does not exist. The popular view, we imagine, would be to blame the man for intoxication, but not to hold him responsible to the extent of the acts he did while in that state. Now we have observed that whenever the legal view is not in harmony with popular sentiment, some judges frequently attempt to avoid the real consequences of the legal doctrine, either by fine discriminations by which it can be held that individual instances do not come

---

(a) Bradley on Mental Conflict and Imputation, Mind N. S., 43, pp. 312-13.



under the general rule, or by mitigating the penalties without any adequate logical reason. Such an instance was pointed out in murder cases in the Chapter on Intention and again in cases of Kleptomania, etc., in the Chapter on Insanity, and the present subject affords another example.

The popular view is against condemning a man to death who has caused the death of another by an act done while in a state of intoxication, because it does not credit him with the intention of killing but rather considers that he does not properly know what he is about, and so is not fully responsible for his act. It is, we believe, as a concession to this feeling that English judges and writers on English law hold a view that appears to be opposed to the accepted meaning of the Indian Criminal Code, of which some illustrations will now be given.

Speaking of intention in drunkenness, it is said :—" When the crime alleged is such that the intention of the accused is one of its constituent elements, the jury may look at the fact that he was in drink in considering whether he formed the intent necessary to constitute the crime (*R. v. Doherty*, 16 Cox, 306, Stephen, J.):"(a) and again, "upon an indictment for murder the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated (*R. v. Grindley*, 1 Russ., 8; *R. v. Thomas*, 7 C. & P., 817; *R. v. Meakin*, 2 D. 297)."(b)

"If the existence of a specific intention," says Sir J. Stephen, "is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such a crime should be taken into account by the jury in deciding whether he had that intention."(c)

The passages quoted seem equivalent to saying that the fact that the man was intoxicated alters his intention in the eye of the law, which is just exactly what it is held the Indian Law does not permit to be pleaded; and they certainly are not in accord with the interpretation of intention according to which every man

---

(a) Archbold's Pleading and Ev. in Crim. Cases, 21st Edn., p. 21.

(b) *Ibid.*, p. 21.

(c) Stephen, Digest of the Criminal Law, 3rd Edn., Art. 29.

is presumed to know the natural results of his act, and, if to know them, therefore also to intend them. Although in India the judges do not venture to rule that intoxication can alter the intention, they nevertheless so far give way to the popular prejudice in the matter as to refrain sometimes from passing a capital sentence when the murder was committed by an intoxicated man,<sup>(a)</sup> or they will take the fact into consideration as affecting the state of the accused's mind with respect to the question of provocation.<sup>(b)</sup> It is not apparent why the law should be stricter in India than in England on the point, and it would certainly both be more in harmony with popular sentiment and also correspond more closely with the psychological facts if the English view were adopted.

That the treatment of intoxication in the Indian Criminal Law is most unsatisfactory may be shown both by the comments of some legal writers and also by a psychological consideration of the state of drunkenness. Sir William Markby writes:—

Unsatisfactory nature of the treatment of intoxication in the Indian Criminal Law

“The Indian rule is very difficult of comprehension, I am not quite sure what is meant by ‘a particular knowledge or intent’, but I suppose setting fire to a house is an offence though not done with any *particular* knowledge or intent; yet it is not at all likely that intoxication was intended to be an excuse in such a case. On the other hand, passing counterfeit coin is clearly an offence in which a particular knowledge is necessary, namely, knowledge that the coin is spurious; and, therefore, a drunken man who takes a counterfeit coin, which he would certainly have discovered to be counterfeit if he had been sober, and pays it away without discovering it, might under this provision be convicted of passing counterfeit coin knowing it to be counterfeit. But this seems very remarkable. *The question how far intoxication affects liability, can never, I think, be satisfactorily settled by presuming that things are different from what they really are. If the state of mind which we call knowledge or intention is essential to the breach of the duty or obligation in question, the first consideration will be, whether*

---

(a) See e.g., *Nga Thet Hnin v. Q.-E.* Printed Judgments, Lower Burma, p. 550.

(b) *Nga San v. K.-E.*, Lower Burma Rulings, Vol. II, p. 204.



*or no the drunkenness was such as to have prevented the possibility of such a state of mind. It is perfectly consistent with very great drunkenness that a man should know and intend the consequences of his acts. A soldier who, after a day's hard drinking, discharges his musket in the face of his sergeant, may know and intend the consequences of his act, just as well as the jealous lover who stabs his rival in the arms of his mistress. Indeed it is hardly possible to preserve the physical capacity to execute this sort of crime, without also retaining the low degree of intelligence which is necessary to the offence. But if that is not the case ; if the drunkenness is such that no offence can have been committed, or not the particular offence with which the person is charged, then the true effect of presuming knowledge or intention in spite of the facts, is to make drunkenness itself an offence, which is punishable with a degree of punishment varying with the consequences of the act done."*(a)

We desire to associate ourselves with the remarks in the two passages which we have placed in italics. Elsewhere the same writer says :—" There is a rough attempt to sanction the imputation of intention or knowledge in criminal cases concealed under the plausible maxim ' drunkenness is no excuse for crime.' But I doubt whether the imputation is ever really made. The drunken soldier who in a fit of fury fires his rifle at his commanding officer really intends to kill him. There is, however, a formal legislative attempt to impute knowledge (not intention) in cases of drunkenness in the Indian Penal Code, sec. 87."(b) Sir William Markby seems to imply that intention is not imputed under this section, but we have already seen(c) that, by use of the presumption that every one is presumed to know and therefore to intend the ordinary consequences of his acts, Mr. Mayne and others impute intention equally with knowledge under this section, a presumption which we have criticised at length in Chapters III and IV.

The plausible maxim that ' drunkenness is no excuse for crime ' appears to be expanded by another writer, who says that in cases

(a) Markby : Elements of Law, pp. 367-8.

(b) *Ib.*, p. 138 (apparently the reference should be to sec. 86, I. P. C., and not sec. 87).

(c) Chapter III, Para. 5 *ante*.



of drunkenness and violent anger scarcely distinguishable from insanity, "though the effects on intention, and even on the voluntariness of muscular motion, resembles that resulting from insanity, yet they are conditions for which the person suffering under them is directly accountable. These states are the immediate consequences of voluntary indulgence and these consequences may properly be assumed to be foreseen. Thus strictly speaking, all the disastrous results that often follow from indulgence in drink or unbridled passion, are properly imputable to him who voluntarily puts himself into a state from which the results would possibly, as he might have known, spring." From this position, however, he then proceeds to retire partially by admitting that in certain cases, namely, 'where a distinct perception of the nature and immediate consequences of an act forms the very essence of its legal validity or imputability, *e.g.*, joining in a conspiracy to do an illegal act, the state of mind implied in drunkenness is generally held to repel the presumption of voluntariness and intention. Also in other cases such as murder and robbery with violence, though drunkenness is no excuse, it operates by way of mitigation of penalty.(a)

What we contest here is the justice of treating an intoxicated man as responsible for all the consequences of his act to the same extent as if he were sober, merely on the ground that he became intoxicated voluntarily. As will be clear from our psychological description of the state of alcoholism, it attributes to him a mental state entirely different from that which he really has at the time of his acts, and it achieves this by looking solely to the consequences of the act and presuming therefrom a purely fictitious mental condition. That some true idea of the real mental state in drunkenness must be obtained, either from psychology or medicine or somewhere, seems to be plain, so far as English law is concerned, from the fact that it allows a man to repel the presumption of voluntariness and intention by proving the state of mind 'implied' in drunkenness. Take, for example, the following most recent utterance that we have been able to find in *R. v. Meade* (1909):—"A man is taken to intend the natural conse-

---

(a) Sheldon Amos: *Science Law*, pp. 109-10.

quences of his acts. This presumption may be rebutted in the case of a *sober* man in many ways. It may be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved the presumption that he intended to do grievous bodily harm is rebutted.' (a)

If this is allowed to be shown in English law, we do not see why it should not also be allowed to be proved in Indian law,—if indeed it is at present really excluded under a true interpretation of the latter law,—but we do not understand how it can really be proved in either without a knowledge of psychology.

One of the main features of alcoholism is the reduction of the power of restraint. This is because alcohol paralyses in the brain those centres which check and regulate the actions of the brain nerves. This checking influence is sometimes called inhibition: in drunkenness this inhibition fails, and the impulse rushes to action. (b) Another writer expresses it by saying that alcoholism puts a man's brain out of action. It is found by examination that alcohol actually destroys the brain: the pyramidal layer, called by Dr. A. Wilson the layer of intellect, is shrunk in chronic alcoholism, and in acute alcoholism is swollen and the nuclei pushed aside. It is demonstrated that in alcoholism the delicate machinery of the prefrontal cortex which contains the highest association centre, the seat of inhibition and volition, is the first to be paralysed. The first symptom in acute alcoholic poisoning is the loss of the higher psychic functions, control and will power. Shortly after follows loss of memory for recent events, then confusion of ideas. Later the motor functions suffer; garrulosity ensues due to loss of control of the speech centre, then staggering gait, and when muscular power and the muscle sense have gone, sensation disappears altogether. (c) For the same reason, namely, that wine paralyses the inhibitory centres, suggestibility is increased.

---

(a) *R. v. Meade*, C. C. A. (1909), 1 K. B., 895.

(b) Munsterberg: *Problems of To-day*, pp. 107-8.

(c) Dr. A. Wilson: *Education, Personality and Crime*, pp. 67, 109, 235.



Alcohol can produce a state of suggestibility in which complete imitations of post hypnotic suggestions become possible.(a) In alcoholic delirium the impressions received are indistinct and therefore are manufactured into illusions: also owing to weakness of the power of attention the patient cannot concentrate his attention upon them.(b) To such an extent is the memory weakened that violent acts are not infrequently committed by the intoxicated man of which there is no after-recollection.

It has been found possible to show by experimental psychology the extent to which the mental powers of the drunkard are weakened as compared with those of the sober man. This is done by experiments with rapidity of movements in the memory tests or in discriminations of stimuli, reaction times, intellectual activity, mental associations, effort for action, estimation of space and time distances, imitation of rhythms, etc., etc. The same man is first experimented on when sober and then after receiving various doses of alcohol. Prof. Munsterberg sums up the results of these experiments as follows:—"All motor re-actions have become easier, all acts of apperception worse, the whole ideational interplay has suffered, the inhibitions are reduced, the merely mechanical superficial connections control the mind, and the intellectual processes are slow. Is it necessary to demonstrate that every one of these changes favours crime? The counter ideas awake too slowly, hasty action results from the first impulse before it can be checked, the inhibition of the forbidden deed becomes ineffective, the desire for rash vehement movements becomes overwhelming." The various effects of alcohol in different climates and seasons, on different races, sexes and ages, and also the effects of different kinds of alcohol can thus be studied. (c)

We think that this description should suffice to show how entirely different is the state of mind of the intoxicated man from that of the sober man. It is believed that the same is true to a considerable extent of persons who have taken drugs such as opium, haschish, cocaine, and morphia. Similar toxic effects have been

---

(a) Munsterberg: *Psychology and Crime*, p. 194.

(b) G. Störing: *Mental Pathology and Normal Psychology*, pp. 62-63.

(c) Munsterberg: *O. C.*, pp. 250-5.



observed from the use of Indian hemp, where delirium and vivid hallucinations occur. If the state of mind is so different in alcoholism, however you may decide to punish the drunken man, it seems a clear anomaly to attribute to him the same knowledge and intention that he would have had, if he had been sober, and to base the punishment on this assumption. This system adopted, at all events, in the criminal law should be abandoned and some less fictitious method should be substituted. Inasmuch as the intoxicated man is clearly at a disadvantage, as compared with the sober man, in his power of self-control and resistance to suggestion, we think it would not be unreasonable to enforce a mitigated penalty in his case. No doubt it may be said that he is on that account more dangerous to society which is therefore justified in punishing him more heavily to protect itself, a principle which apparently was the basis of the law of Pittakus of Mitylene, according to which a double penalty was prescribed for an offence committed in a state of intoxication. But we shall contend hereafter that the interest of society cannot be made the sole ground for punishment.

In civil law intoxication is considered under the head of sound mind, and for the purpose of making a contract a person is said to be of sound mind if he is capable of understanding the contract and of forming a rational judgment as to its effects upon his interests; and a man who is so drunk that he cannot do this cannot contract while such drunkenness lasts.<sup>(a)</sup> This implies that drunkenness is a form of unsoundness of mind which is the contention of Dr. Mercier, who argues with much force that intoxication is actually a form of insanity and asserts that it is only because the cause of it is obvious, the condition temporary, and the manifestations of the insanity as a rule differ somewhat from those in insanity due to other causes, and have a general resemblance to other cases due to the same cause, that this insanity is not recognised as such. In essential nature the two are identical, and if, after a prolonged course of drink extending over year a man becomes habitually uproarious and habitually prone to commit unprovoked assaults, he is looked upon not as being drunk but as insane. He

---

(a) Indian Contract Act, s. 12, illustration (b).

points out that in general paralysis of the insane there is precisely the same kind of elevation of mind, the same thickness of articulation, the same reel in the gait, the same clumsy inefficiency of the digital movements that characterize ordinary drunkenness, and further that these characteristics are not invariably present in the insanity of drunkenness itself. However the manifestations of drunkenness may vary in different cases, we still find that in all cases the action of alcohol on the nervous system follows the same law as in insanity, *viz.*, it abolishes the function of the nerve-regions in the order of their succession from above downwards. The highest suffer first and most, the lowest last and least, not only have we one well marked and distinct variety of insanity which reproduces with minute faithfulness the signs displayed in ordinary drunkenness, but every form of insanity is reproduced with accurate simulation by some case of drunkenness. If the effects of a drunken debauch do not pass away in a few hours or days, the manifestations then become like those of mania and the patient often goes into an asylum. The last stages of drunkenness and insanity are identical and indistinguishable, as both end in coma.

On these grounds he concludes that "if this condition (*i.e.*, of intoxication) is one of insanity when prolonged and proceeding from no obvious cause, none the less is it one of insanity, so long as it lasts, when it is of brief duration, and when a manifest cause can be assigned for it. The causation and duration do not affect the nature of the malady, however much they may determine its gravity. The insanity may be the transient insanity of drunkenness or the permanent insanity of general paralysis; but if the manifestations of drunkenness are identical with those of insanity it cannot be denied that the drunkard, so long as he is drunk, is mad." (a)

3. In alleged cases of Insanity, the test made is whether the person can distinguish right from wrong and again it is suggested "whether he hath as great understanding as ordinarily a child of fourteen years hath;" (1 Hale, 30, 412). (b) So also in *R. v. Offord*, 5

(a) Dr. C. A. Mercier, *Sanity and Insanity*, 2nd Edn., pp. 314-21.

(b) Archbold, *op. cit.*, p. 22.

C. & P., 168, it is said: "It seems clear, however, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature,"(a) the concluding words suggest that when right and wrong are spoken of, what is morally right and wrong is intended and not merely what is legally right and wrong. That this is so is further distinctly stated in another passage:—"If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then he will be responsible for his actions (1 Russ. 13: *R. v. McNaughten*, 10 Cl. and Fin. 200; 1 C. & K. 130n.; *R. v. Higginson*, 1 C. & K. 129)."(b)

Sir James Stephen's exposition of the English law on Insanity may be quoted at length as it illustrates the uncertain state of it. "No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind—

- (a) from knowing the nature and quality of his act; or
- (b) from knowing that the act is wrong; (or,
- (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.)

But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects abovementioned in reference to that act."(c) It is explained that the parts in brackets are doubtful law, and that the word "wrong" in (b) is variously interpreted as meaning:—1. Morally wrong. 2. Illegal. This is equivalent to admitting that on just the two points that are

---

(a) Archbold, *op. cit.*, p. 22.

(b) *Ibid.*

(c) Stephen, *op. cit.*, Art. 27.



difficult to determine the law is uncertain and unable to give a decision that is free from doubt.

Elsewhere when discussing Insanity the same author combats the theory that the knowledge required to constitute malice is not a knowledge that a given act is wrong, but a knowledge that it is illegal, and observes :—" If this were true it would set the law in opposition to those moral sentiments on which it ought to be founded for the sake of obtaining a degree of precision not really greater than that which it possesses at present." (a)

In view of this and the preceding quotations it may be said with respect to knowledge that what the law requires for responsibility is the presence in the man of the knowledge of what is morally right and wrong : but there remains the other qualification mentioned above, *viz.*, the power to act or abstain from acting, and it is with regard to this that the hardest questions arise and the legal view appears especially unsatisfactory. In one passage cited above it is said : " If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime," and again we find " where the intellectual faculties are sound mere moral insanity—where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself and acts under an uncontrollable impulse—does not render him irresponsible. (*R. v. Burton*, 3 F. & F. 772)" (b)

The assumptions underlying such utterances are that madness is concerned with the intellect only and not also with the emotions which we have shown in the chapters on insanity to be untrue, and that intellect can restrain the passions, whereas we believe the fact to be that there are cases—and many cases—in which it cannot do so. We have quoted in Chapter III many passages from psychological writers to the effect that it is feeling and desire which govern actions and not thought or the intellect, and that the purely intellectual element is in itself powerless to determine our acts. If the appetites are sufficiently strong on the other side it is idle to speak of reason restraining them, and it is just these cases

---

(a) Stephen, *A general view of the Criminal Law of England*, p. 93.

(b) Archbold, *op. cit.*, p. 23.

which are the ones classed as instances of moral insanity, and the true nature of which is really described in the phrase "uncontrollable impulse" used above: if they are uncontrollable, it is clear that you cannot expect reason to control them.

The subject is sufficiently important to quote here more at length the passage from which an extract was given in the Chapter on Intention. "Each of the forms of volitional control just illustrated," says Professor Sully, "has its limits. Thus there is a state of lethargy or depression of active energy, out of which even the most powerful motive may fail to rouse the subject. At the other extreme there is a strength of instinctive or 'organic' impulse which no ideational motive can overcome. The story of the horrors of shipwrecked mariners, and so forth, illustrates the fact that no moral or other consideration will hold back a man from slaking thirst when the appetite reaches a certain intensity, and the means of appeasing it are brought within tantalising distance of his lips. In like manner the control of feeling has its limitations. There are hurricane blasts of passion, as when Lear first takes in the fact of his daughter's perfidy, against which the will is for the moment powerless . . . . These limitations are not the same in the case of all individuals. The limit to control of appetite in the case of the drunkard and of the temperate man is obviously a widely different one. What we call strength or force of will is, indeed, measured by the 'height' or maximum degree of intensity of the force counteracted." (a)

In the case of outbursts of feeling the law so far admits their uncontrollable character that in cases of homicide it provides (s. 300, Indian Penal Code) an exception which reduces the act to culpable homicide when done in a sudden passion in the heat of a quarrel, or again when under grave and sudden provocation the agent has lost his self-control; but in the case of those 'instinctive or organic impulses' which lie deeper down in our nature and are therefore more difficult to restrain no such concession has been made. It is here that we find cases of moral insanity, and to say that reason must control them or fear or regard for

---

(a) Sully, *Outlines of Psychology*, pp. 436-7.



society or other such motives, is to fail to realise the strength of the organism and the limits of human power. To legislate as though such cases do not exist from the fear that their recognition will weaken the incentive to self-control, and to require by law the exercise of a control which to some men is an impossibility cannot, it seems to us, be defended, because such a course rests on a false basis. It will be far better to modify the legal view of responsibility so as to admit that they do exist and then to determine how society is justified in dealing with such cases, a subject which will be briefly considered later.(a)

Nor must the consideration of the hereditary nature of vicious tendencies be omitted as affecting the question of responsibility and punishment. We shall be content to quote a single passage from Darwin. "There is not," he says, "the least inherent improbability as it seems to me, in virtuous tendencies being more or less strongly inherited; for, not to mention the various dispositions and habits transmitted by many of our domestic animals to their offspring, I have heard of authentic cases in which a desire to steal and tendency to lie appeared to run in families of the upper ranks; and as stealing is a rare crime in the wealthy classes, we can hardly account by accidental coincidence for the tendency occurring in two or three members of the same family. If bad tendencies are transmitted, it is probable that good ones are likewise transmitted. That the state of the body by affecting the brain has great influence on the moral tendencies is known to most of those who have suffered from chronic derangements of the digestion or liver. The same fact is likewise shown by the perversion or the destruction of the moral sense being often one of the earliest symptoms of mental derangement; and insanity is notoriously often inherited. Except through the principle of the transmission of moral tendencies, we cannot understand the differences believed to exist in this respect between the various races of mankind."(b)

---

(a) Mr. J. D. Mayne's view of Insanity has been examined elsewhere, see p. 399, *et seq.*, and the nature of uncontrollable impulses has been more fully treated in Chapters XI and XII.

(b) Darwin, *Descent of Man*, Vol. I, p. 189.



In many of these cases we believe that the culprit has not the power to resist. This seems evident in some instances of Kleptomania. Dr. Wilson thus describes one such case. The woman could not resist stealing though she took precautions against detection. She was a moral cripple. She said that if alone she could not resist stealing. "It was not the value of the object but a lust to steal. Many criminals have used the same expression. As all these abnormal people take precautions against detection, the law cannot realise that it is an obsession or possession and deal with them as if they were normally equipped in intelligence and self-control." (a)

4. This leads us to the consideration of another point.

There appears to be a strong opinion that the present classification of criminals into sane and insane, according to which they are held by the law to be either fully responsible or entirely irresponsible, does not meet the circumstances sufficiently. Some writers go so far as to speak of "born criminals," others speak of abnormal and undeveloped minds and of degenerates : whatever the exact expression employed, the meaning seems to be that there are some persons who on account either of congenital causes, or of poor development due to want of nutrition, become weak and feeble-minded. They are able in a way to look after themselves, but they are not able to resist temptations to crime. Under the most favourable circumstances they would probably lead harmless lives, but as most of them belong to just those classes in which the struggle for existence is hardest, and any mental or bodily deficiency the greatest handicap, they inevitably succumb to circumstances and become criminals. It is maintained that their responsibility for the crimes they commit is not such as to justify incarcerating them in jails, detention in which will neither frighten nor reform such intellects. They are regarded as a class intermediate between the mentally sound and the really insane, and it is usually suggested that they should be confined in homes or colonies such as exist in Belgium and elsewhere on the continent.

Necessity of some alteration in the present legal classification of criminals.

---

(a) Dr. A. Wilson : Education, Personality and Crime, p. 187.

This view is prominent in Dr. A. Wilson's works "Unfinished Man" and "Education, Personality and Crime." It is supported to some extent by an examination of the brains of deceased criminals which are often found to be developed improperly or wanting in some of the normal parts, and by statistics of the physical state of convicts. Thus in the official report of Pentonville Prison it was said that on an average the prisoners under twenty-one years of age are 2 inches less in height and 14 lbs. less in weight than the average industrial population of similar ages; 28 per cent. of them suffer from some physical disease or deprivation. The highest proportion of re-convictions was among this class, being no less than 40 per cent.<sup>(a)</sup> It is also well known that many of such physical defects are due to hereditary causes.

The ground on which it is proposed to treat this class differently from the ordinary criminal is that their mind is so different from the normal that they should not be judged by the same principles. They live on a distinctly lower plane. Dr. Wilson makes four classes of these criminals: (1) The insane and the mentally weak; (2) Those on the border line; (3) Sports or varieties due to heredity; (4) Accidents due to environment. As regards the second class, he says that they are not insane enough for asylum treatment, but are so unstable and neurotic as to be a continual source of anxiety to their friends: if they occur among the poor, as there is no proper home-life nor anyone to look after them, they become wanderers and criminals, and, if sent to ordinary prisons, are certainly doomed. His classification of criminals as a whole consists of (1) Normals; (2) Bloodthirsty degenerates; and (3) Indolent, weak-minded degenerates. The second class he regards as hopeless, and advocates confining them permanently in colonies or extinguishing them painlessly in lethal chambers. It is the third class which corresponds to those described above: these, he says, can be improved but can only be fit for easy work. They should not have full liberty, but should be kept under supervision or in a colony. As their brain is not normal and their

---

(a) T. Holmes: *Psychology and Crime*, p. 21.

control power has never been trained or developed, they cannot improve under our present prison methods, and are certain to fall away again as soon as they leave the jail. As regards responsibility, his view is summed up in the following words :—“ If these facts be true, and they are supported by observation and experiment, there is for some people no such thing as responsibility or free will. Normals, who are few, have it as their brains are perfect. The deficient are, however, more numerous than would appear, and require careful examination when in trouble, not by the police, the lawyer, or even the judge, but by the expert psychologist, to see exactly what amount of workable machinery they possess. Till then many will be incorrectly credited with free will and punished, where will paralyses, or absence of will robs them of place of responsibility.”(a)

Though there may be some exaggeration in such a view, it cannot be denied that there is much truth in it. Even those who oppose most strongly the theory of the “ born criminal ” have to admit that some persons are born with inferior minds and on that account come to crime. Thus Prof. Munsterberg says that men are not born with brains which necessarily produce criminal actions, but only with brains that are more liable than others to produce anti-social actions. There is a steady and continuous transition from the normal to the entirely abnormal. The variations which produce the criminal effect may lie in different directions : the brain may be inclined to overstrong impulses, so that any desire rushes to action before the inhibiting counter-idea gets to work. Or it may have unusually weak counter-ideas, so that even normal impulse does not find its normal checking, or the associative apparatus of the brain may work specially slowly so that the counter-acting ideas do not arise in time. Again, the emotions may be unusually strong or there may be strong suggestibility : or a number of these factors may act in combination, each of which increases the chance that the individual may come into danger in the midst of developed society. He maintains that these factors do not involve the necessity of crime : the same brains might simply

---

(a) Dr. A. Wilson : Education, Personality and Crime, pp. 99, 187, 190,  
236



show stupidity or credulity or inconsiderateness or brutality or stubbornness or egotism, without running into conflict with the law. His distinction is that the criminal is never born as such, he is only born with a brain which is in some directions inefficient and which thus, under certain unfavourable conditions, will more easily come to criminal deeds than the normal brain.(a) Elsewhere he says that "criminals are recruited specially from the mentally inferior; that is the only true core of the doctrine of the born criminal."(b)

These distinctions do not seem to us to dispose of the broad fact that it is owing to the initial mental defect that many criminals come to crime. The conditions of life in which this class are usually born are such as to be "unfavourable conditions" more often than not, and, therefore, the combination to which Prof. Munsterberg refers is likely to occur. He says that there is a steady and continuous transition from the normal to the entirely abnormal mind, and it seems to us that it is really a matter of degree. In this transition there are points at which the degree of abnormality, though it falls short of insanity, combined with the unfavourable external conditions in which the person is placed, renders it practically impossible for him to resist crime. In such cases we do not think that he should be held to incur the same responsibility for his act as the sane man, and we agree with Dr. Wilson and others that incarceration in an ordinary jail is only likely to make him a hopeless criminal. We think it not improbable that we should disagree with Dr. Wilson in some cases as to whether that point had been reached, but we have no doubt that we should agree with him in many cases that the man ought not to be held responsible as the law now holds him.

What, then, is the duty of the law with respect to such cases? At present it ignores them and it only comes near to any consideration of their condition when it speaks of insanity. It seems to us that its duty clearly is to amend its definition of insanity, so as to fix the position of these feeble-minded or degenerate persons somewhere between the sane and the insane. It must also

---

(a) H. Munsterberg: *Psychotherapy*: pp. 385-6.

(b) H. Munsterberg: *Psychology and Crime*, p. 244.

lay down the manner in which they should be treated on conviction, whether by deportation to colonies like that at Marx-plas in Belgium, or in whatever way political and moral philosophy may decide. To continue to force this class to come under one or other of its two heads sane and insane, simply means to include them in the former which must produce injustice and lamentable after results in many instances.

5. The subject of punishment naturally follows that of responsibility and, although it is one on which much has been written, we cannot on that account altogether omit it, though it is not intended to give an exhaustive discussion on it. The view taken of it will naturally vary with what is regarded as its chief object. It may be looked at as retributive, preventive, or as reformatory in character, or as uniting all these objects in one, and this will not exhaust all its sides : but it will make a great difference which aspect of it is most emphasized and whether attention is paid most to the claims of Society or the individual.

The retributive view due probably to religious conceptions is, we believe, that of the plain man, that punishment must follow guilt. “ We pay the penalty, because we owe it ; and for no other reason: and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, &c.” (a) The suppression of wrong is the assertion of right, which is an end in itself: punishment is inflicted for the sake of punishment, and no other end is necessary, all that is required is that it should be deserved.

This is the view which, according to Kant, ought to govern judicial punishment, and as we shall point out later that in some instances, at least, it does not do so, we shall quote at length the passage on the subject in Kant’s *Werke* IX, 180, 183 :—(b) “ Judicial punishment (*pœna forensis* ) is not the same as natural (*pœna naturalis*). By means of this latter, guilt brings a penalty on itself ; but the legislature has not to consider it in any way. Judicial

---

(a) Bradley, *Ethical Studies*, p. 25.

(b) The passage is quoted in *Ethical Studies*, pp. 26, 27, note 1.

punishment can never be inflicted simply and solely as a means to forward a good, other than itself, whether that good be the benefit of the criminal or of civil society; but it must at all times be inflicted on him, for no other reason than because he has acted criminally. A man can never be treated simply as a means for realizing the views of another man, and so confused with the objects of the Law of Property. Against that his inborn personality defends him: although he can be quite properly condemned to forfeit his civil personality. He must first of all be found to be punishable, before there is even a thought of deriving from the punishment any advantage for himself or his fellow-citizens. The penal law is a categorical imperative: and woe to that man, who crawls through the serpentine turnings of the happiness-doctrine to find out some consideration, which by its promise of advantage, should free the criminal from his penalty, or even from any degree thereof. That is the maxim of the Pharisees, "it is expedient that one man should die for the people, and that the whole nation perish not; but if justice perishes, then it is no more worth while that man should live upon the earth."

Mr. McDougall attributes the conception of retributive punishment to the doctrine of free-will. For since, according to this assumption, where human action is concerned, the future course of events is not determined by the present, punishment cannot be administered in the forward-looking attitude with a view to deterrence or moral improvement, but only in the backward-looking vengeful attitude of retribution. He regards this view of punishment as barbarous, and thinks that punishment is only justifiable if it is inflicted as a deterrent from further wrong doing. It must be such as may fairly be expected to deter the wrong-doer or to modify his nature for the better.(a)

There is, however, also another meaning attached by some writers to retributive justice, *viz.*, that it is due to sympathetic resentment. Thus J. S. Mill writes: "The desire to punish a person who has done harm to some individual is a spontaneous outgrowth from two sentiments, both in the highest degree natural,

---

(a) Mr. McDougall, an Introduction to Social Psychology, pp. 13-4, 232.



and which either are or resemble instincts: the impulse of self-defence and the feeling of sympathy. It is natural to resent and to repel or retaliate, any harm done or attempted against ourselves; or against those with whom we sympathise.”(a)

But Mill never held that this is retributive punishment pure and simple; he distinguishes it as follows:—“ If indeed punishment is inflicted for any other reason than in order to operate on the will; if its purpose be other than that of improving the culprit himself, or securing the just rights of others against unjust violation, then I admit the case is totally altered. If any one thinks there is justice in the infliction of purposeless suffering; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt, pain should be inflicted by way of retribution; I acknowledge that I can find no argument to justify punishment inflicted on this principle. As a legitimate satisfaction to feelings of indignation and resentment which are on the whole salutary and worthy of cultivation I can in certain cases admit it; but here it is still a means to an end. The merely retributive view of punishment derives no justification from the doctrine I support.”(b) And again, “ There are two ends which, on the necessitarian theory, are sufficient to justify punishment; the benefit of the offender himself and the protection of others.”(c)

Mill, therefore, combined the curative view of punishment with that of the protection of society, *i.e.*, the preventive view, but he repudiated the retributive one. Plato also draws a parallel

The reformatory  
view.

between the physician and the judge(d) and seems to regard the law as a kind of medicine: but the objection to this is that punishment hardens as often as it cures and further, as Mr. Bradley says, if punishment is medicine, then if rewards carried with them the benefits of punishment, I should deserve rewards when and because I am wicked.(e) It is only another way of

---

(a) J. S. Mill, *Utilitarianism*, p. 76. (c) *Ibid.*, p. 592.

(b) Mill's *Hamilton*, p. 597.

(d) Plato, *Republic*, Book III.

(e) Bradley, *op. cit.*, p. 28.

combining the reformation principle with that of the promotion of the safety of society, to explain the object of punishment as the desire to extirpate wrong ideals;(a) it is the practicability of the method that is here in question and to a certain extent its justifiability. The question how far society is justified in punishing men for their opinions depends to a great extent on the view taken of the individual's claims as against the state: and as regards the possibility of influencing a man's beliefs by pains and penalties, Bain answers that "penalties are able to control beliefs, with a slight qualification. They can put a stop to the profession of any opinion; and in matter of doubtful speculation, they can so dispose the course of education and enquiry, that the mass of mankind shall firmly believe whatever the State dictates."(b)

It is not uncommon to find writers neglecting the reformatory view of punishment altogether. This seems to us a mistake, if only from the point of view of its connection with the protection of Society. There is much force in the following reasoning:—"The primary object must be the cure of the individual, while the secondary aim must be the protection of the community. If the former succeeds, the second follows; whereas if the order be reversed, as now, there will always be failure in both objectives. To protect the community without reforming the culprit is impossible.(c)

Next to the retributive view the plain man will defend punishment by its deterrent effects, indeed this is  
 The preventive view. his chief argument for the retention of capital sentences. Hear, therefore, what the most popular of modern philosophers, Herbert Spencer says on the point: "Nay even a distinct foresight of evil consequences will not restrain when strong passions are at work. How else does it happen that men will get drunk though they *know* drunkenness will entail on them suffering and disgrace, and (as with the poor) even starvation? How else is it that medical students who *know* the disease brought

---

(a) S. Alexander, *Moral Order and Progress*, 3rd Edn., p. 330.

(b) Bain, *Mental and Moral Science*, p. 404.

(c) Dr. Wilson, *Unfinished Man*, p. 347.

on by dissolute living better than other young men, are just as reckless and even more reckless? How else is it that the London thief who has been at the treadmill a dozen times, will steal again as soon as he is at liberty? . . . . . If hopes of eternal happiness and terror of eternal damnation fail to make human beings virtuous, it is hardly likely that the commendations and reproofs of the schoolmaster will succeed. There is, in fact, a quite sufficient reason for failure—no less a reason than the impossibility of the task. The expectation that crime may presently be cured whether by State education or the Silent system or the separate system, or any other system, is one of those utopianisms fallen into by people who pride themselves on being practical. Crime is incurable, save by that gradual process of adaptation to the social state which humanity is undergoing. Crime is the continual breaking out of the old unadapted nature—the index of a character unfitted to its conditions; and only as fast as the unfitness diminishes can crime diminish. . . . It is not by humanly-devised agencies, good as these may be in their way, but it is by the never-ceasing action of circumstances upon men, by the constant pressure of their new conditions upon them, that the required change is mainly effected.”(a)

If it be true that evil consequences do not deter the criminal who has to suffer them, is there any reason to suppose that others who merely see the punishment undergone by their fellows would be thereby deterred?

To the opposite effect Bain says: “Withdraw the power of punishing, and there is left no conceivable instrument of moral education. It is true that a good moral discipline is not wholly made up of punishment; the wise and benevolent parent does something by the methods of allurements and kindness, to form the virtuous dispositions of the child. Still, we may ask, was ever any human being educated to the sense of right and wrong without the dread of pain accompanying forbidden actions? It may be affirmed with safety, that punishment or retribution in some form, is one-half of the motive power to virtue in the very best of

---

(a) H. Spencer, *Social Statics*, Edn. 1892, pp. 171-2.



human beings, while it is more than three-fourths in the mass of mankind.”(a)

It is the deterrent view of punishment which is the most interesting to the psychologist. To him it is a case of mental inhibition, whether the fear of a future judicial punishment will be a sufficient counter idea to check the criminal impulse. Prof. Munsterberg considers it in this light, and remarks that “ too many conditions must frustrate such expectations. The hope of escaping justice in the concrete case will easily have a stronger feeling tone than the opposing fear of the abstract general law. The strength of the forbidden desire will narrow the circle of associations and eliminate the idea of the probable consequences. The stupid mind will not link the correct expectations, the slow mind will bring the check too late when the deed is done, the vehement mind will overrule the energies of inhibition, the emotional mind will be more moved by the anticipated immediate pleasure than by the thought of a later suffering. And all this will be reinforced if overstrain has destroyed the nervous balance, or if stimulants have smoothed the path of motor discharge. If the severity of cruel punishments has brutalised the mind, the threat will be as ineffective as if the mildness of the punishment had reduced its pain. And, worst of all, this fear will be ruled out if the mind develops in an atmosphere of crime where the child hears of the criminal as hero and looks at jail as an ordinary affair, troublesome only as most factors in his slum life are troublesome ; or if the anarchy of corruption or class justice, of reckless legislation or public indifference to law defeats the inhibiting counter idea of punishment and deprives it of its emotional strength. The system of punishment will be the more disappointing the more mechanical it is in its application. The plan of probation thus means a real progress.”(b)

These considerations show that there are many reasons why deterrent punishments should fail in their aim, and that it is only with minds of certain descriptions that they are likely to succeed. That they are unlikely to achieve their object in many cases seems

---

(a) Bain, *op. cit.*, p. 405.

(b) Munsterberg : *Psychology and Crime*, pp. 258—60.

to us certain, namely, in those cases in which the impulses are very violent and pass into actions most rapidly. Here the assumption of those who rely on deterrent punishment is simply that the intellect can restrain the passions, and we have already given ample grounds for holding that it can rarely do this. Now deterrent punishment has this disadvantage that its failure is more disastrous in its results than either of the other two forms : indeed retributive punishment, from one point of view, can hardly be said to be liable to failure. Deterrent punishment from the fact of its severity must have some result : if it misses its aim of prevention, it can only do harm.

We must not be taken to endorse all or any of the views quoted : our object is rather to show the difference of opinion which exists among those who have studied the objects of punishment and its efficacy to promote such aims, and to apply some of these views in what we have to say concerning the administration of justice under the law.

6. It will next be considered to what extent the legal notion of punishment is founded on each of the above views, and it is not intended by this to assert that these characteristics of punishment are necessarily opposed to one another : it is recognised that they may easily flow into one another, but, in so far as one is emphasized to the exclusion of the others, different results will ensue.

To what extent the legal view of punishment is founded on each of these three characteristics.

According to Bain "the infliction of punishment by law although gratifying to the sympathetic resentment of the community, is understood to be designed principally for the prevention of injury. The design of punishing offenders by Law is to secure the public safety. Incidental to this is the gratification of resentment which, however, is still to be in subjection to the principal end." This is founded on the statement of the late Sir James Stephen from whom he quotes the following :—"The benefits which criminal law produces are two-fold. In the first place it prevents crime by terror : in the second place it regulates, sanctions and provides a legitimate sanction for the passion of revenge. I shall not insist on the importance of this second advantage, but shall content

myself by referring those who deny that it is one, to the works of the two greatest English moralists, each of whom was the champion of one of the two great schools of thought upon the subject—Butler and Bentham. The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite (J. F. Stephen's *General View of the Criminal Law of England*, p. 98).”(a) Mr. McDougall holds that justice and the greater part of public law are founded in the main on moral indignation, and that laws in opposition to the moral indignation of a majority of the members of a society can only be very imperfectly enforced by the strongest despotism, as we see in Russia at the present time. The root of moral indignation is the tender emotion connected with the parental instinct: the impulse is essentially protective, and, when this instinctive impulse meets with obstruction, anger is aroused. Hence it is induced especially by the sight of a person inflicting pain on a defenceless creature: it springs from an altruistic motive not an egoistic one. It is not however alone sufficient to explain public justice. Vengeful emotion or revenge also contributes: this is a compound of anger and self-feeling and is essentially egoistic. These two emotions have been prominent in the growth and maintenance of every system of criminal law and every code of punishment. Punishment was originally retributive and still retains something of this character. The administration of criminal law is the organised and regulated expression of the anger of Society, modified and softened in various degrees by the desire that punishment may reform the wrong-doer and deter others from similar actions.(b) It will thus be seen that this writer assigns some influence to each of the three views of punishment when accounting for public justice.

“Legal punishment is preventive and nothing more,” says another writer “for, however much the legislation may have a moral object, the administration of the law cannot concern itself with the inner character of the subjects.”(c)

---

(a) Bain, *op. cit.*, 267.

(b) W. McDougall, *op. cit.*, pp. 72—5, 140—4, 293.

(c) S. Alexander, *op. cit.*, p. 330.



This view neglects the retributive and reformatory sides of punishment and looks exclusively to the interest of Society : there can be little doubt that it has the chief influence in the administration of the law, and further that there is a tendency to emphasize unduly this object. We will proceed to give some examples.

What are known as the preventive or bad livelihood sections of the Criminal Procedure Code are framed in the exclusive interests of Society to the complete disregard of its obligations to the individual. Under these sections(a) men are called on to give security for good behaviour, and if they fail to do so, are imprisoned, in most cases with hard labour not because they have committed any offence but for fear lest they should do so, if they remained at large. It is not pretended, so far as we know, that this punishment has a reformatory effect on them ; indeed as it is ' habitual ' criminals who are chiefly to be treated in this way, it would be somewhat of a farce, if such a contention were made. Nor can it be said to be retributive in character, because they are convicted of no offence before their imprisonment, or, if it is termed retributive, on the ground that it is a punishment for past convictions, then the man is avowedly punished twice for the same offence, which is against the law. It is clearly therefore a measure for the protection of Society and nothing else.

We do not think that it will be denied that many Magistrates have an aversion to the employment of these sections, and the pressure to use them comes almost entirely from the side of the Police who regard themselves as responsible for the safety of the persons and property of the people : this reluctance is easily explained in the light of our previous remarks. The popular view of Justice is the retributive one, that punishment is given only because it is deserved and that it is an end in itself : hence as these men have committed no definite crime, they do not appear to deserve punishment, and the ordinary man will not admit that the interest of Society is in itself a sufficient reason.

---

(a) Criminal Procedure Code, ss. 109, 110.

And the popular instinct in the matter is a sound one : for not only is this procedure contrary to what appears to be natural justice, but, if once the right of Society be admitted to imprison men who have committed no crime, as a protective measure, there is no guarantee where this course will stop. Such license must inevitably re-act detrimentally on Society itself, and what is done with hesitation by one generation will be decreed without compunction by the next. . Kant's protest must always remain true "a man can never be treated simply as a means for realizing the views of another man, and so confused with the objects of the law of property. Against that his inborn personality defends him."

For if Society is justified in regulating the lives of the individuals that compose it so as to promote the well-being of all, it must be remembered that it has an obligation to the individual to allow him the opportunity to develop the capacities that are in him : this is the lesson which is taught us by the writings of the late T. H. Green, and this aspect of the question cannot be overlooked. How does Society fulfil its task ?

It has always struck us that there is a certain irony in imprisoning men merely on the ground that they have 'no ostensible means of subsistence' for these are one class to whom the preventive sections apply. Is it no fault of the Society in which they live that they are without these means ? Have the measures of Society to introduce cheap labour into the land done nothing to depress the rate of wages and render the struggle for existence harder ? Even its benevolent efforts to ward off death from famine and plague serve but to increase competition in the highly populated districts and to make greater demands on the food supply of the country. Does not Society create opportunities for crime by some of its property laws which otherwise would not exist, and can it be said that it has never legislated for the interests of one class to the detriment of another ? Or that the education which it provides, or has failed to provide, has not been responsible for some ruined lives ? Buckle from the remarkable regularity in the statistics of murder, suicide and marriage drew the following conclusion:—"We have here parallel chains of evidence formed with extreme care, under the most different circumstances, and all pointing in

the same direction ; all of them forcing us to the conclusion that the offences of men are the result not so much of the vices of the individual as of the state of Society into which that individual is thrown.”(a) It is an offence to attempt to commit suicide, but to what in many cases are such attempts due ? Suicide, says Prof. Morselli, being really the result of the struggle for existence, is found most among civilised nations where the struggle is keenest. Here the brain decays and breaks down under the excessive weight of a struggle to which its forces and faculties are unequal. Suicide augments with the diminution of the means of subsistence by a simple effect of the Malthusian principle of the population. Suicide through misery, or deficiency of food, suffices to explain all the others.(b) Surely social conditions have much to do with this offence. We may quote the words of Prof. Munsterberg: “ It must be said again : Criminals are not born, but made—not even self-made but fellow-made.”(c) Professor Alexander also suggests a similar view in the following words :—“ The real significance of the doubts which are so strongly felt at the present day as to the lawfulness of punishment lies not in the fact of responsibility itself, but in the distribution of responsibility. It concerns a practical not a theoretical question. A man brought up in criminal surroundings takes to burglary as a duck takes to the water : he is responsible for his thefts, but the responsibility is divided between himself and those who failed to give him ideas of right and wrong. Practically, it becomes the duty of Society to see that the temptations to vice are removed from its members as far as possible. And in proportion as it has neglected this duty will be the vividness of the feeling that a particular criminal is suffering for the sins of others as well as his own.”(d) We have not space to attempt to argue this matter in full : we wish simply to suggest doubts in the minds of those who think that Society should regulate matters how it will and that the individual must give way, whether this is always just to the latter.

---

(a) T. H. Buckle, *History of Civilization*, General Introduction, p. 29.

(b) H. Morselli, *Suicide*, 2nd Edn., pp. 354-71.

(c) Munsterberg, *Psychology and Crime*, p. 260.

(d) S. Alexander, *op. cit.*, p. 342.



7. It seems now the season to protest against the neglect of what is due to the prisoner guilty though he may be to some extent. It has become a settled principle that certain offences shall be punished in India with exceptional severity because it is for the interest of Society that they shall be put down : we allude to cases of cattle-theft, boat stealing and some offences against the Opium and Excise laws. We do not know on what principle it can be said that it is a 'greater crime to steal two bullocks valued at Rs. 120 than it is to steal clothes worth that amount or to take the money itself out of a till : yet the punishment in one case will be two years' imprisonment without fail, and in the other probably it will not exceed one year or may be even less, while if that amount be misappropriated the penalty in most cases would not exceed six months, even though a breach of trust be committed.

But when once we introduce the principle of the protection of Society anything appears to be justified : because men allow their cattle to wander about without supervision, opportunities to steal them frequently occur, and therefore in order to make up for Society's neglect in this respect, the punishment for the crime must be made so severe as to deter criminals from attempting it. That is to say, Society itself provides special opportunities for the crime and thereby tempts the man to become a thief, and then claims that the culprit shall not merely be punished for his crime but also for the fact that it was made easy for him.

The only other defence that we have seen of these sentences is that the cattle are the cultivator's means of livelihood and the boat the villager's necessary means of subsistence, but is this not equally true of the stock-in-trade of the clothes dealer or the coin of the money-lender or indeed of any form of wealth in the hands of its user ? It may be that it is a greater crime to rob a poor man than a rich, but we do not remember to have seen the argument put in this form with reference to cattle and boat stealing, nor would it always be applicable for the owners of cattle are often wealthy men. Nor indeed is it easy to see how the law could be administered on so avowed a principle of class distinctions.

The severity of sentences for the illicit sale of opium and liquor is open to a more sordid interpretation, and at the same time to a more charitable one. If it be correct that Society looks with much disfavour upon these crimes because the illicit vendors by competing with the licensees injure their monopoly and lower the value of their licenses and hence lessen the amount of revenue which they will pay for them to the State, it is no longer the protection of Society which governs the case but rather its money-making power. But if these heavy penalties are not a tribute to Mammon, and are rather aimed at checking the spread of opium and liquor consumption, because Society considers it harmful to its members, we have the spectacle of a house divided against itself. Opinion is divided as to the noxious character of the drug; the spread of such consumption in itself shows that Society is fighting against its own members, and apart from the question of the efficacy of such measures to attain their object and of the obligations to the criminal in the case, there arises here the further consideration of the extent to which a majority may rightly coerce the minority and under what circumstances, which is too long a matter to enter into now.

To inflict punishment on the offender in order to reform him is a view of the object of punishment to which we have already referred, but to inflict punishment on him in order that others may be not merely saved but reformed seems to go beyond the Pharisaic maxim, it is expedient that one man should die for the nation.

But we must further protest against the inhuman sentences which are habitually passed for trivial thefts on the ground that the offender has been four or five times convicted before and so has become a terror to Society. It is no infrequent thing to see terms of ten years' imprisonment given and sentences of transportation for life in such cases. We are aware of the arguments by which they are justified, that such men merely prey on Society and have had their chance given them and shown themselves hopeless of reform: but we must repeat, is Society entirely blameless in this matter? Is Society's interest the one consideration in the

In Opium and  
Excise cases.

Long terms of im-  
prisonment passed on  
habitual criminals  
for trivial offences.

case, and, even if it were so, is it necessary to imprison such men for life? We submit that this is regarding punishment too exclusively from the side of the protection of Society, and that this is not the view which the law should adopt.

“To ensure obedience to law,” says Bain, “there must be some pain inflicted on the disobedient, sufficient, and no more than sufficient, to deter from disobedience.”<sup>(a)</sup> But it will be said, no amount of punishment will make these men law-abiding: if so, you admit that punishment will not accomplish the object you aim at and so your case for punishment fails and Herbert Spencer is right that crime is incurable by such means.

Indeed, we have already seen that there are psychological grounds for the belief that deterrent punishment must frequently fail in this endeavour. There are, however, other psychological facts which should be considered. It appears to us that, so far as the effect on the criminal himself is concerned, long sentences of imprisonment must defeat themselves owing to the effect of habit and the monotony of prison life. Prof. Sully remarks that what we have grown used to generate an attachment or clinging of mind which betrays itself whenever it is removed. Custom produces a tenacious clinging of mind: the older and more fixed the habit, the harder it is to bear the sundering of the bond. “So strong indeed is this influence on our life of feeling, that a man will become attached even to the most dreary surroundings when they have become his through long usage. It is said that men who have been long confined in prison have returned voluntarily to their accustomed haunt.”<sup>(b)</sup> This no doubt partly explains the well-known fact that it is the habitual convict who behaves best in jail: it also explains why imprisonment is no terror to him. The effect of the monotony of the life contributes to the same result as it dulls the mind and renders it insensible to pain: it thus destroys the feelings on which alone punishment and pain can have effect. Thus Dr. Wilson writes:—“Long periods of incarceration are very trying to the nerves. In fact, old chronics often say that the monotony completely ‘breaks’ them. This

(a) Bain, *Mental and Moral Science*, p. 404.

(b) J. Sully: *The Human Mind*, Vol. II, pp. 35-6.



monotony includes many things, such as the uniform temperature week in, week out ; the long periods of silence ; the uninteresting and unprofitable occupations, the dinginess or dimness of their cells, and other details." And again :—"The ex-burglar king tells me that men who have been seven and ten years in prison are quite 'broke.' They lack enterprise, intelligence and guiding power, being partly demented by prison life. But, he says, they are so used to prison that they do not dread it, and many men, after ten years, would as soon stay on another ten years as go out and face the world." As regards the brutalising effect, he says :—"Our present system of punishing a man several times for the same offence is not only unscientific but brutal. The system of gradually increasing the sentences for old offenders never cures and only hardens." (a) He further suggests that the fact of frequent crimes does not point to hardness, as usually assumed, so much as to mental deficiency, some congenital brain defect which prevents the delinquent abstaining from crime. (b)

We have already seen that Prof. Munsterberg states that "if the severity of cruel punishments has brutalised the mind, the threat will be as ineffective as if the mildness of the punishment had reduced its pain."

We have no reason to suppose that there is no foundation for these opinions which have been recorded after study and observation on the part of those who hold them. They suggest to us serious reflections. In the first place they point to the paradoxical conclusion that short sentences are more deterrent to the criminal than long ones. This may be quite possible as long sentences seem not to be deterrent at all, which is explicable by the fact that long imprisonment destroys the only feelings on which fear can work. Is not society then fighting a losing battle, if it first destroys what are the necessary conditions for victory, and then attempts to wage the conflict in the absence of those conditions ? Again, if it be true, that frequent crimes point more to brain defect than to hardness of heart, in many instances must it not be the case that long imprisonment can have no deterrent

---

(a) A. Wilson : *Unfinished Man*, pp. 133, 204, 320.

(b) A. Wilson : *Education, Personality and Crime*, p. 110.

effect? Is it worth while even to start the contest here? We are aware that it can be argued that the system of long sentences at all events succeeds so far that it keeps these criminals out of the way for long periods during which they are harmless.

But all that this contention warrants is to detain these men in some place where they cannot injure Society, an Asylum, a home or the like, but it does not justify the use of penal measures: this has been recognised by those who not long since started the movement in England for life-long confinement of habitual criminals, not in jails but in homes. The majority, however, who approve long sentences on hardened criminals do not dissociate the penal view from that which looks purely to the protection of Society, because they have doubts as to the right of Society to detain men for life on such grounds only. It is patent to them, as indeed it should be to all, that, to employ Kant's words, this is 'using a man simply as a means of realising the views of another man': their natural sense of justice compels them to maintain that the detention is at least in part because the man by his crime has deserved punishment. But how little desert really enters into the case is plain from the magnitude of the sentence when weighed against the triviality of the offence.

8. At some time or other the question must be faced, how far shall the interests of Society be allowed to encroach on the bounds of justice? It is not only the criminal and the lunatic whom Society seeks to detain, but it will shortly be also moral insanes and hypnotic patients who have been made instruments of crime, for this is the recommendation of the authors of *Animal Magnetism*.(a) Nor is it likely that we shall stop here. We are drifting in the direction where Society is to be protected at any cost and the individual counts for nothing—nay, even the individual's crimes are to be excused if it can be shown that it will be better for Society that he should go free than pay the due penalty of his guilt. For this is the explanation of the decisions in perjury cases that if a witness states what is false on oath and before he has closed his deposition states what is true, he is not to be held

The right of Society to defend itself at any cost to the individual exaggerated.

---

(a) Binet and Féré, *Animal Magnetism*, p. 373.

guilty of perjury.(a) It is argued that it is for the interest of Society that he should speak the truth, though it be at the last, rather than that he should not speak it at all : if, therefore, the fact that he contradicts his first statement, renders his conviction for perjury certain, he will have a direct motive to stick to the falsehood and the truth will never come out of him.

We do not deny the force of this argument : for the interests of Society it doubtless appears better that he should under such circumstances go free, but nevertheless we say with Kant, " but if justice perishes then it is no more worth while that man should live upon the earth." The people that for the supposed promotion of its interests fails to exact the penalty of guilt, itself participates in a public violation of justice : as soon as it begins to identify justice with expediency, it adopts the purely utilitarian standard of right with all its demoralizing consequences.

One of our main objections to making the interests of Society the measure of punishment, is that we thereby tacitly make the effects of an act the criterion of guilt and not the motive with which it is done. This is opposed to the teaching of morality, which, except in the case of the Utilitarians, whatever it may say of the effects never fails also to look to the intention of the doer : it is opposed also to the fundamental idea of responsibility which has already been stated to be that a man is responsible for that which he wills.

For these reasons we cannot acquiesce in such a proposal as that made by Mr. Marshall. He says that we do not really punish a man because we hold him responsible for his deeds in the past, although we may say that we do. When it is clear that a man has committed a crime, but we do not deem it in our interest, or in the interest of humanity as a whole, that his crime be punished, we quite irrationally trump up some reason for declaring him to have been irresponsible at the time of the criminal act. When we pity the girl who has killed the man who has wronged her, we say

---

(a) See *Q.-E. v. Nga Tha Dwe*, Printed Judgments, Lower Burma, p. 21 ; and *Reg. v. Balkrishna*, there quoted, and especially the remarks in *Murvena Madoo v. Q.-E.*, *ibid.*, p. 247 ; *Q.-E. v. Nga Po Nyun*, p. 79 ; and *Mi Me Ma v. Q.-E.*, p. 91.



she was temporarily insane at the time she murdered him, *i.e.*, we do not wish to punish her as a murderess, and therefore declare her to have been irresponsible at the time of the act. When we see the child steal and are overcome with compassion, we say its youth carries with it irresponsibility. The difficulty is in the great diversity of opinion and uncertainty as to when a human being is to be held responsible and punished, and when irresponsible and allowed to go free. This difficulty would disappear if we accept the view that a human being is at each moment to be held responsible for *all* the acts committed by him as an individual, and then acknowledge frankly that we punish crime not because the criminal is responsible (for that he always is) but because we wish to protect ourselves and society. Our action then is thoroughly rational. Thus we may hold that although the child is responsible for its theft, it is not worth our while to punish him as we would an adult, as if put under proper guidance in a better environment, he will probably develop a moral sense which will render him incapable of theft. So with the girl who murdered her faithless lover, that she is a woman who under proper guidance, may lead a normal life of usefulness: therefore we need not hang her, but place her under educative restraint, which will enable her to avoid such conditions as led to her crime. Such a course would obviate the scandals in American Courts, where criminals set up the plea of insanity in order to prove themselves to have been irresponsible at the time of the criminal act, hoping to avoid punishment. In such cases we should incarcerate such men permanently or long enough to assure ourselves that they were no longer the kind of men to commit such acts, or we might hang them, if we believed that others of their type would be deterred from like crime by the knowledge that the punishment of such crimes is death. We should then concern ourselves no longer with questions as to when men are responsible and when irresponsible, but with questions relating to the value of punishment and its practical effects, *e.g.*, the cost to the State of its corrective institutions and constabulary, and how far the restrictions thus maintained are of value: how far restrictive punishment is necessary for the protection of society and how far it is of value to the individual as a member of the social body. We should disallow

the notion that the responsibility of one's acts may in certain cases be shifted by appealing to the surroundings and conditions which have led up to the criminal act, or to the unfortunate state of the man's health, or to his morbid development, or to his youth and inexperience.(a)

This is pure utilitarianism and is a good example of the spirit of those who hold the view that anything is justifiable in the interests of society, and that the individual has no claims to be considered. Mr. Marshall, when tracing the genesis of punishment, states that it sprung originally from the self-protective habits of mankind, but admits that *pari passu* with the growth of systems of protective punishments, there has appeared an emphasis of the notion of responsibility which is found in its germ in the inner sense of every man. He appears to consider that, with respect to this, it is sufficient to say that we have each made our present self what it is, and therefore are responsible for all of our acts. But this seems to us to be merely a pretence of considering the question of responsibility. It may be true that the self of the moment would not be what it is except for the previous existence of our other selves, but from this it does not follow that all the circumstances which Mr. Marshall would sweep out of consideration as irrelevant have not also contributed to cause the act. Indeed some of them actually help to form the individual self and in some cases they are circumstances over which the individual has had no control. We must, therefore, regard Mr. Marshall's theory of punishment as one which looks solely to utility and robs justice of all its sacred character.

Punishment cannot be separated from Responsibility and the idea of Justice, and into neither of these does the notion of the interest of Society enter. Punishment must be founded on responsibility and justice. "In the feeling of responsibility" says Höffding, "and in repentance is implied no more than that the individual recognises that he has willed the action, and by virtue of the better mind to which he has come condemns

---

(a) H. R. Marshall: *Consciousness*, pp. 627—30, 634—6.

himself for having done so :”(a) and concerning justice Professor Sully writes :—“ Thus the sentiment of justice embodies in a higher representative form, and takes up into itself something of the flavour of the earlier and simpler passion of anger or resentment.”(b) And again, “ thus the peculiar feeling of condemnation of a wrong action can be traced down to the instinctive re-action of a purely individual or egoistic resentment.”(c)

The desire to promote the interests of Society is a notion alien to justice : it may be that sympathy enters into some men’s idea of justice, but this is an entirely different feeling from that which inspires the deterrent view of punishment. It is a mere extension of the feeling of resentment to cases in which others are affected, and is in no way based on utility. This is clear from the writings of even such a Utilitarian as Mill, as *e.g.*, in the following passage :—“ The sentiment of Justice in that one of its elements which consists of the desire to punish is the natural feeling of retaliation or vengeance rendered by intellect and sympathy applicable to those injuries, that is, to those hurts, which wound us through or in common with, Society at large.”(d) Those authors who mention the protection of Society in this connection regard it as an incidental consequence of the measures taken for other objects, but not in any way as the motive which inspired them. So Buckle writes : “ To sympathy again we must ascribe the establishment of rewards and punishments and the whole of our criminal laws, none of which would have existed but for our disposition to sympathise with those who either do good or suffer harm : for the circumstance of Society being protected by penal laws is a subsequent and subordinate discovery, which confirms our sense of their propriety but does not suggest it.”(e) Similarly, the utmost which Adam Smith will concede to the notion of social convenience is that we frequently have occasion to confirm our natural sense of the propriety and fitness of punishment by reflecting how necessary it is for preserving the order of Society.(f)

---

(a) Höffding, *Outlines of Psychology*, p. 348.

(b) Sully, *Outlines of Psychology*, p. 352.

(c) *Ibid.*, p. 369.

(d) J. S. Mill, *Utilitarianism*, p. 77.

(e) T. H. Buckle, *History of Civilization*, Vol. I, p. 311.

(f) Adam Smith, *Theory of Moral Sentiments*, Vol. I, pp. 89, 92, 115-6.



9. It probably will not be disputed that if confidence is to be retained in any system of administration of the penal law that system must be founded on justice and it must not conflict with the sentiment of the people. "The administration of criminal Justice," says Sir James Stephen, "is based upon morality. It is rendered possible by its general correspondence with the moral sentiments of the nation in which it exists, and if it habitually violated those sentiments in any considerable degree it would not be endured."(a)

And must not be inflicted contrary to the sentiment of the people.

It has been said that what is involved in the popular view of justice is that a man shall answer for guilt by punishment and to the extent only to which he has deserved it : if punishment is used for any other end it is diverted from its legitimate use. It is not the plain man but the rulers and guardians of the people who desire to make of punishment an instrument for protecting Society at large ; this, it seems to us, is shown by the conduct of the people themselves. For, except under the spur of a religious passion or some unusual emotion of terror or wrath, they are never desirous of increasing pains and penalties, but rather of mitigating sentences. It is always the man in the street who gets up the petition to reprieve the condemned murderer, although if the deterrent view of justice were the one that prevailed, it would be clearly for the protection of Society that he should undergo the extreme penalty of the law. The heaviest sentences rarely meet with widespread approval and any public mark of disapprobation of an exercise of clemency by the crown is unknown : the judge who seeks the reputation of a strong man by the severity of the punishments he imposes is merely regarded as an inhuman monster, for the mass of mankind are guided chiefly by their feelings, and there is no surer way to raise sympathy for a criminal than to punish him beyond the normal measure.

Such outbursts as those which have occurred in some American States where white lynchers have burnt and tortured Negroes who have committed the offence of rape on white women, do not in reality show the contrary. These acts are done under the in-

---

(a) Stephen, *A general view of the Criminal Law of England*, p. 82.

fluence of a special emotion of mingled anger and fear which is aggravated by a race-feeling of probably unparalleled strength in any other part of the world ; and though we must confess that the tortures inflicted on the victims are partly for the sake of the deterrent effect, they are partly also due to the feeling that so enormous a crime does not receive its proper penalty except by the infliction of an unusually severe punishment. " In Lynch law," says Professor Alexander, " we have a summary act, which *though springing from the sentiment of vindictiveness*, is the act of a whole community." (a) There is further the additional reason that, owing to their want of confidence in the administration of the law, many of these lynchers believe that if the accused were left to stand their trial, they would escape all penalty for their guilt, and this is the motive which leads them in the first place to take the law into their own hands. And in any case these outbursts are now always condemned by the mass of the citizens who are almost as eager that the lynchers shall in their turn receive justice, as the latter were that the original criminals should not avoid the punishment of their crime.

In a country like Burma there seems to be not merely an entire absence among the people of a desire to protect themselves by inflicting judicial punishments, but also a lack of wish that crime shall meet with its due penalty. This is shown by their dislike to capital punishment, which is partly due to the tenets of Buddhism which forbids the taking of life, and partly to the reflection that when one life has been taken it does no good to take another—a reflection which shows how little they value punishment for its deterrent results. Similarly, while it is always difficult to obtain evidence for the prosecution, the Burmans show no reluctance to depose on behalf of the accused, and while only the depraved among them will commit perjury in civil suits or against the accused in criminal cases, even many respectable men think little or nothing of swearing falsely in order to bring about an acquittal. Nor do they condemn strongly the giving of bribes to escape punishment or even the receiving of them by the Magistrates, and as for their jails, if left to native management, they would soon be rather

---

(a) S. Alexander, *op. cit.*, p. 328.

places of rest than of punishment. From all this it would seem that they have no regard to either the retributive or the deterrent nature of punishment, but they appear to have some belief in its reformatory character : for they readily receive among them and employ men who have been in jail and will even put them in positions of considerable trust. They attribute crime to folly rather than vice and look on men as young up till the age of fifty, and this application of the Socratic view that vice is ignorance, will perhaps explain why they have no desire for heavy penalties.

Though they appear to be exceptional in the lenient view taken of wrong doing, there is nothing in their ideals which is in sympathy with the passing of severe sentences for their deterrent effect and for the protection of Society, and we conceive that this policy, which unhappily seems to be so much in the ascendant, is less likely to receive appreciation among them than in any country with which we are acquainted.



## CHAPTER XVI.

### DIFFERENCES OF RACE.

Reasons for studying differences of Race—Dangers of misinterpreting other minds intensified when there is a racial difference—Difficulties of understanding less civilised peoples—The part of heredity in difference of race—Natural distinctions of temperament—Influence of food and climate—The aspect of nature arouses the imagination or the reason—Effects of Superstition—Religion and Education—Review of certain characteristics of Eastern nations—Their aversion to change—Their want of veracity explained—Forethought only a duty in industrial civilisations—Love of animals among the Burmese conjoined with disregard of human life—Burman fearlessness of death—Their contentment and resignation—Their lack of the power to combine and of conscientiousness—Concluding remarks.

PSYCHOLOGY treats chiefly of the common characteristics of mind, and its conclusions, therefore, like those of most sciences, must in the main be general ; the application of them must be subject to such modifications and allowances as the peculiarities of individuals compel us to make in particular cases. “ It is not sufficient,” says Ribot, “ to describe the manifestations of the mind in general, we must also take into account the individuals in whom they are incarnated and the varieties they reveal to us.”<sup>(a)</sup> We have here and there throughout this volume taken the opportunity as occasion arose to point out some respects in which the Asiatic and the European differ, and the consequent variations which will naturally occur in their points of view, manner of behaviour, &c., under ordinary circumstances ; and we shall now develop this subject further both because of its importance from a psychological standpoint and because it may be of some utility in a work which is partly designed for the perusal of Europeans who have to do with Asiatics.

There is a general danger of misinterpreting other minds to which the psychologist is always alive, and this is intensified when

---

(a) Ribot, *Psychology of the Emotions*, p. 381.

we are trying to understand one of another race. Prof. Sully describes it as follows :—" On the other hand there is a characteristic danger in reading the minds of others which arises from an excessive propensity to project our own modes of thinking and feeling into them. This danger increases with the remoteness of the mind we are observing from our own. To apprehend, *e.g.*, the sentiments and convictions of an ancient Roman, of a Hindu or of an uncivilised African, is a very delicate operation. It implies close attention to the differences as well as the similarities of external manifestation, also an effort of imagination by which, though starting from some remembered experiences of our own, we feel our way into a new set of circumstances, new experiences, and a new set of mental habits. Children again, owing to their remoteness from adults, are proverbially liable to be misunderstood." (a)

A similar warning is given by Prof. James :—" The truth is that we are doomed, by the fact that we are practical beings with very limited tastes to attend to, and special ideas to look after, to be absolutely blind and insensible to the inner feelings, and to the whole inner significance of lives that are different from our own. Our opinion of the worth of such lives is absolutely wide of the mark, and unfit to be counted at all." (b)

It may probably be safely asserted that the difficulties of understanding others arise mainly from want of sympathy with them, and it is not possible to have such sympathy without some experience of pleasure and pains similar to theirs, or without the exercise of an imagination which must be based in part on such experience. Only thus can a man know what causes such feelings in them. Now it is specially difficult to enter into the feelings of others, when their conditions of life (internal or external) are very different from our own. Difference of language (as between Greeks and Barbarians), of colour (as with Negroes), of rank and of faith have afforded long and stubborn resistance to the growth of sympathy in the human race. (c) Any attempt, however, to grasp the thoughts

Difficulties of understanding less civilized peoples.

---

(a) Sully, *Outlines of Psychology*, p. 6.

(b) W. James, *Human Immortality*, p. 125.

(c) Höffding, *Outlines of Psychology*, p. 256.

and feelings of another race must start with an effort to comprehend the powers of that race and the recognition that it is limited by those powers, *i.e.*, by the mental equipment which the race possesses. These powers will depend on inherent differences of race (which will be treated of later), geographical situation, social organization, religion, education, temperament, &c. This truth has been frequently laid down with reference to savages, and though it is not intended to class Indians or Burmans as such, a quotation of some of these remarks will afford an illustration of what is meant. "In considering the state of the savage mind," says Prof. Stout, "the first point to be remembered is that in it complex and comprehensive systems of ideas, which are normally present in civilized races, are simply absent; savages can only apperceive with the systems which they actually possess. Since these are mainly connected with their own actions and with their personal relations the anthropomorphic interpretation of nature follows as a matter of course." (a)

And again, "The root of the matter is that they (*i.e.*, savages) must make themselves at home in the world somehow. They have a multitude of practical and to some extent of theoretical needs, which cry out for satisfaction; and the material for satisfying them is limited. This limitation acts in two ways. In the first place, thought-combinations are possible for them which are impossible for us; because in us they would clash with whole systems of ideas which in the comparatively undeveloped consciousness of the savage have no existence. In the second place, the limitation of their material limits their choice of alternatives. They have to follow out certain lines of mental activity because no others present themselves. Belief is that by which we live, and since the savage must live as he can, so he must believe as he can." (b)

It follows from this that the highly civilized European must be extremely careful when judging what it is probable a less civilized man of another race said or did; for what is improbable to him, because it conflicts with his knowledge and experience would

---

(a) Stout, *Analytical Psychology*, Vol. II, p. 138.

(b) *Ibid.*, pp. 258-9.



not be so to a person endowed with less knowledge and different experience, and courses of action, which to the European are manifestly inferior to others, will be those pursued by the more savage race because they will be the only courses to occur to their minds. It is only by comparison with something better that the less advantageous course appears unlikely to have been adopted. An illustration of the way in which the observer must search in his own mental life for analogies by the aid of which he can imagine the mental life of those around has been given in the chapter on Imagination.(a)

2. Among the various causes which contribute to difference of character among races, the somewhat dis-

The part played  
by heredity in differ-  
ence of race.

puted influence of heredity will be first noticed. The subject is too wide to be discussed at length and we shall therefore have to be content with citing the views of a few writers on the subject.

According to Wundt, "The assumption of the inheritance of acquired dispositions or tendencies is inevitable, if there is to be any continuity of evolution at all. We may be in doubt as to the extent of this inheritance; we cannot question the fact itself . . . . . But more individual gifts—the transmissibility of certain talents is unquestionable—also appear to lend probability to the view that the propagation of definite dispositions takes place, at least within certain limits . . . it is the *disposition*, not the actual functional capability which is connate . . . Ideas cannot be inherited any more than complex volitional actions. Talent and instinct alike are latent until external stimulation calls them into actual life."(b) Prof. Sully thus sums up the contentions of the evolutionists:—"According to Mr. Spencer and other evolutionists, transmission of acquired character is a chief factor in the evolution of the human race, since it secures the slight improvement of each successive generation by the inheritance of the fruit of the exertions of its predecessor. If we adopt this view we may argue that every sound child born in a civilized community brings with it into the world an outfit

(a) Chapter X, para. 7.

(b) Wundt, *Human and Animal Psychology*, pp. 405-6.

of instinctive tendencies or dispositions constituting the natural basis of the civilized and moralized man. These tendencies being comparatively late in their acquirement by the race, are necessarily inferior in strength to the deeper seated and earlier acquired impulses of the natural man ; yet they form a valuable support to all educational effort.”(a)

It was the view of Buckle and Mill that there are no fundamental natural differences in the various races into which mankind is divided, but differences are produced by physical agencies, *i.e.*, climate, food, soil, the aspect of nature, social and moral influences, &c.(b) Since their time, however, the theory of inheritance of dispositions or tendencies has steadily gained ground and they cannot be neglected : “ that great differences arise in spite of similarity of education shows,” says Höffding, “ that at any rate a natural basis always plays some part.”(c)

Now in the opinion of Mr. Bradley this natural basis amounts to the inheritance of the basis of a national type of character. “ It is, I believe,” he says, “ a matter of fact that at birth the child of one race is not the same as the child of another ; that in the children of one race there is a certain identity, a developed or undeveloped national type, which may be hard to recognise or which at present may even be unrecognisable, but which, nevertheless, in some form will appear.....We see the child has been born at a certain time of parents of a certain race, and that means also of a certain degree of culture. It is the opinion of those best qualified to speak on the subject, that civilisation is to some not inconsiderable extent hereditary ; that aptitudes are developed and are latent in the child at birth ; that it is a very different thing, even apart from education, to be born of civilized and of uncivilized ancestors. These ‘ civilized tendencies,’ if we may use the phrase, are part of the essence of the child ; he would only partly (if at all) be himself without them ; he owes them to his ancestors and his ancestors owe them to society.”(d)

(a) Sully, *op. cit.*, pp. 75, 76.

(b) T. H. Buckle, *History of Civilization*, Chap. II, p. 39, and p. 178. J. S. Mill, *Principles of Political Economy*, Vol. I, p. 390.

(c) Höffding, *op. cit.*, p. 351.

(d) F. H. Bradley, *Ethical Studies*, pp. 153-4.

Since these words were written Prof. Weismann's views have been published and received wide acceptance. He denies the transmission of acquired characters, holding that only congenital attributes of ancestors re-appear in descendants, and that exercise of the organ or faculty produces no effect in improving the connate powers of descendants. Nevertheless, several writers who are specially psychological in character do not appear altogether to follow Weismann. In addition to the opinion already quoted, Prof. Sully accepts it as at least supposable that the individual inherits in his cerebral organisation a formative tendency corresponding to the uniform relations of space, time, substance, attribute, and causal agency. He cites the rapidity with which the child acquires ideas of things as distinct wholes or unities, of space and time relations, and of making or producing, as confirming this supposition, though he says that as yet we cannot separate and estimate quantitatively this inherited factor in thought.(a) Dr. A. Wilson is of opinion that characters acquired by the parents continue, if the same conditions endure: diseases may be transmitted when the nervous system is involved and the tendency to certain diseases is also transmitted. In favour of the view that psychological characters are inherited, he cites the fact that children who have never seen their parents, have grown up to resemble them mentally. Also that the more intelligent people beget intelligent children and *vice-versâ*, though *supra* intelligent persons often have dull children, as if they had exhausted themselves in that particular direction. He therefore concludes that "it is absurd to take up a positive attitude against the heredity of mental characteristics."(b) Somewhat similarly Mr. Marshall infers that the essential part of many of our ideas must be given to us by inheritance from the marvellous mental development of Helen Keller, who was blind, deaf and dumb. He says that almost as wide a range of ideas are present to her as to us, and it is difficult to comprehend how this can be unless, apart from the experiences of her life, ideas have been presented to her

---

(a) J. Sully, *The Human Mind*, Vol. I, p. 447.

(b) A. Wilson: *Education, Personality and Crime*, p. 33; *Unfinished Man*, pp. 182, 202.



corresponding with neururgic patterns which arise in her nervous system as the result of inheritance from her ancestors.(a)

Mr. McDougall in a recent work writes as follows :—

“ However the continuity of psychical constitution of succeeding generations of a species, a stock or a family is maintained, it seems not improbable that the experience of each generation modifies in some degree the psychic constitution of its successors. The Neo-Darwinians have denied that any such modification takes place, chiefly because it seems impossible that such experiences should impress themselves upon the structure of the germ plasm. But if the structure of the germ plasm is not the only link between the generations, this positive objection to the Lamarckian principle disappears ; and we are free to accept the mass of evidence which points to some partial transmission of the effects of experience. Such modification of the hereditary basis would be least in respect of those characters which have long been established in the race, and are least susceptible to modification in the individual by psychophysical activities ; among these would be all the specific bodily characters and all the fundamental form of psychic activity. It would be greatest in respect to those more recently acquired mental characters which are the peculiar property of man ; it is just these characters, such as mathematical, musical and other artistic talents, and the capacity for sustained intellectual and moral effort, that seem to exhibit the clearest indications of the effects of experience and of psychical effort, cumulative from generation to generation.”(b)

It seems necessary to insist on this power of heredity as it will enable us to realize to some extent the difference which must exist between various races and the way in which such differences are created. But there seems to be further a distinction of temperament among peoples which has always been widely recognised and must clearly have much influence on their thoughts and actions. Darwin describes what we are alluding to in the following terms :—“ Their mental characteristics are likewise very distinct ;

(a) H. R. Marshall : *Consciousness*, p. 93.

(b) W. McDougall : *Body and Mind*, p. 378.

chiefly as it would appear in their emotional, but partly in their intellectual faculties. Everyone who has had the opportunity of comparison must have been struck with the contrast between the taciturn, even morose aborigines of South America and the light-hearted talkative Negroes. There is a nearly similar contrast between the Malays and the Papuans who live under the same physical conditions and are separated from each other only by a narrow space of sea.”(a)

These last words inevitably recall to mind a somewhat similar difference between natives of India and Burmans, as well as between the various races of India who live in close proximity to one another.

Prof. James seems to be describing the same phenomenon in his remarks on the obstructed and explosive will.(b) He there contrasts the type of character in which impulses seem to discharge so promptly into movement that inhibition gets no time to arise, the dare-devil and mercurial temperaments common in the Latin and Celtic races with the cold-blooded and long-headed English character in which inhibition plays so great a part. “It is the absence of scruples, of consequences, of considerations, the extraordinary simplification of each moment’s mental outlook, that gives to the explosive individual such motor energy and ease; it need not be the greater intensity of any of his passions, motives or thoughts: as mental evolution goes on, the complexity of human consciousness grows ever greater, and with it the multiplication of the inhibitions to which every impulse is exposed.”

Here again one involuntarily likens the explosive type to the Burman character, and if so, it is at once seen how opposite it must be to the English one, a fact which is likely to lead to each misunderstanding the other and the attempt to make the Burman comply with standards which are unsuitable to him. It does not therefore at all seem clear that the English Justice of which we are so proud is necessarily the best kind for the Burman, though it is not surprising to find it assumed so, *e.g.*, in newspapers which are edited by Englishmen.

---

(a) Darwin, *Descent of Man*, Vol. I, p. 260.

(b) W. James, *Principles of Psychology*, Vol. II, pp. 537—9.

A writer who has studied crime closely, expresses the case as follows:—"But as the peculiarities of crime and criminals are generally questions of latitude and longitude, climate, environment, social condition and national temperament, so it seems to me that the psychology and mannerism of criminals must differ accordingly, and that the rules set up for guidance in one part of the world may be quite inapplicable to another part." (a) We think that it has frequently been felt—and, indeed, we have often heard such an opinion expressed—that there is something unfair in the application of a severe system of justice built up by and designed for a northern race like the English, with its special cold, unemotional character, to a light-hearted, childish, impulsive southern race like the Burmese. The same, we believe, would also apply to a people like the Negroes. Dr. Wilson has made a detailed comparison of the head and skull of Negroes and Europeans. He finds that there are many features of the Negro's skull and head bones which differ from those of the European and resemble the ape in some details: they are inferior to the white races, and their brain is of simpler pattern and inclined to the foetal type. As a man the Negro has still the build of a European boy: his mental characteristics are essentially juvenile. It is not in accordance with biological principles that the black man should be on an equal footing with the white man. "The negro is a lower development, and I think the more we explore the criminal and the degenerate, we shall find that in their 'unfinished' condition they are reversions to the simple type—as it were to primæval man. If this be true, we should recognise it and not measure them by such high standards." (b) We do not know whether any similar examination has been made of the skulls of the Indian and Mongol races: although they are no doubt in a higher state of development than the Negroes, we believe them to share to some extent in the childish characteristics of the latter, and it is on this that is based the feeling that the severity of the punishments awarded under our code is in excess of the measure suitable to races whose sense of responsibility is not yet developed

---

(a) T. Holmes: *Psychology and Crime*, p. 6.

(b) A. Wilson: *Unfinished Man*, p. 190.



to our level. Yet it is, we think, the case, that the sentences or imprisonment passed on offenders of these races are longer than those passed for similar offences in England.

3. We now pass on to the results of those external influences such as climate, food, soil, social and moral agencies, which some writers consider to be entirely responsible for the differences which they have observed between races. These results have been well traced by Buckle on whose account most of the following remarks are based.(a)

Influence of food  
and climate.

Wherever life has been made easy by a favourable climate which renders less food necessary to preserve life and also makes it abundant, as in tropical climates like India, Egypt, Mexico and Peru, population is stimulated and the people are depressed, all power remaining with the upper class ; though wealth is accumulated its dispersion is prevented, and so the upper classes get a monopoly of one of the most important elements of social and political power and the great body of the people derive no benefit from the national improvement. This is Buckle's explanation of a phenomenon which exists no doubt in the countries he speaks of, but in Burma where the population has not been stimulated beyond the capacity of the country to support them, the condition of the people is one of content rather than of depression, and though it is true that under the Burmese kings all power was in the hands of the upper classes, the submissiveness of the people was probably due rather to the want of any motive for dissatisfaction with the existing state of things under which they were well-to-do and for the most part let alone. The result may be seen in the presence of a spirit of independence among the Burman labouring classes which is entirely absent in the Indian coolie and a consequent greater intelligence and ability to look after themselves.

Turning to the aspects of nature, these either excite the imagination or arouse the reason : the conditions are such as to do the former in the east and the latter in the west. " Everywhere," says Buckle, " the hand of nature is upon us, and the history of the

Aspects of nature  
arouse the imagination  
or the reason.

---

(a) See Buckle, *op. cit.*, Chapter II.

human mind can only be understood by connecting with it the history and aspects of the material Universe.’’(a) Now, in the tropics, the external world is more formidable than in Europe, nature is on a more gigantic scale and its aspects more sublime and terrible ; it is more dangerous to man because the mountains are greater and form greater barriers ; earthquakes, tempests, hurricanes and pestilences are more frequent and their effects more destructive. It is the imagination which deals with the unknown, and that which is unexplained stimulates it and subdues the reason. Man contrasting himself with the force and majesty of nature around him recognises his own impotence ; but where, as in the west, the works of nature are small and feeble, and he can overcome difficulties, he has greater confidence and reliance on his own powers. The phenomena are more accessible, and he can experiment and observe them, and so an analytic spirit is encouraged and reason triumphs.

It is common to hear the Burmans described as an imaginative and lively people, and in the writer’s opinion the description is a correct one. We have above one of the causes which has contributed to make them so, while the absence of such conditions in Britain is partly responsible for the lamentable lack of imagination and consequent inability to understand or appreciate anything non-British which characterises the average Englishman and Scotchman. From this the Irishman has been partly saved by his different temperament and the fact that his country is not so severely commercial, and he has in consequence qualities and defects of his own sufficiently akin to those of the Burmese race to earn for the latter the appellation of the Irish of the East.

But the aspect of nature contributes in another way to make  
 a distinction between races : hand in hand with  
 Effects of supersti- imagination goes superstition, and phenomena,  
 tion. such as earthquakes, volcanic eruptions, pestilences, &c., are wont to be ascribed to supernatural intervention and a strong religious sentiment thereby aroused. Buckle gives as instances in which a danger is not only submitted to but even

---

(a) See Buckle, *op. cit.*, Chapter II, p. 143.

worshipped the case of the Hindoos in Malabar and the natives of Sumatra, who will not destroy tigers.

In tropical climates health is more precarious and disease more rife than in temperate zones, and so the fear of death more present ; hence men are more prone to seek supernatural aid. On the subject of another life reason is silent and imagination unchallenged, and the most fatal diseases are ascribed to some deities ; few who have visited the East have not heard of or experienced, *e.g.*, the tomtoming of the Chinese to keep off the Cholera Devil, and superstition of this kind is strongest where medical knowledge is most backward. In Burma, for instance, where the native doctors are ignorant of even the rudiments of medical science, as recently as about the year 1899, a remarkable example of the grossest superstition was given by the Burman members of the Rangoon Municipality in a discussion on the necessity of taking steps to prevent the introduction of the Bubonic Plague into Rangoon. These members advised that it would be sufficient to read out passages from their sacred books at the corners of the streets to keep off the plague and do nothing else ; it is true that in some Christian churches men still offer up prayers for the same object, but how little they rely on such a remedy is shown by their conduct, for it does not lead them anywise to abate sanitary and hygienic measures.

Credulity of course is usually in proportion to want of knowledge, and particularly to ignorance of the explanation of physical agencies. Nature suggests ideas to the Eastern mind which are not rejected because they are not incompatible with the existing knowledge of the people. There is, however, this difference between the Asiatic and the European in this respect ; in Europe credulity was at one time unbounded merely because the age was then barbarous, but with advancing civilization it rapidly disappeared ; but in the East examples of credulity can be found in Indian literature which was the work of a civilized and lettered people long after the period of barbarism was passed. This may be accounted for by the greater part which the environment causes imagination to play among the Eastern races and also their manner of life. For the whole East is mainly agricultural in its pursuits



wherever the climate is tropical, and agriculture is favourable to the growth of superstition, depending, as it does, upon the weather, the laws of which are not as yet understood and which is absolutely beyond the control of mankind. As science has advanced in the West it has dispelled much of the mystery which surrounds the subject, but inasmuch as the superstition of a people is in proportion to the extent of its physical knowledge, in the East it remains unchecked and inclement weather is attributed to any and every cause. Thus, in Upper Burma in the region which is subject to drought, the natives say that they have had no good rain owing to the coming of the British when they annexed the land.

To find an analogy to the Eastern agriculturists among ourselves, we must look for some profession the main business in whose life is equally dependent on the weather, and we find it in the case of sailors who are notoriously superstitious and credulous because they are similarly exposed to dangers which cannot be foreseen. Or, again, one must go back to the days before astronomy was a science when comets and eclipses were regarded as due to supernatural agency and the signs of coming disaster for no other reason than that the laws which governed them were as yet undiscovered. This, however, is not the frame of mind of the ordinary European who belongs to the manufacturing class and is not subject to such influences; he relies more on himself and his own skill and labour, and therefore it is so difficult for him to understand at all the manner of thought of the man brought up in the midst of such different circumstances. Further, his attention is distracted from those sources which feed the imagination and superstition. For in Europe the population of towns outstrips that of the country, and when men congregate together in great cities their thoughts are concerned with the business of human life and are turned away from the works of nature.

The measure of civilization is the triumph of the mind over external objects, and, says Buckle, "the tendency has been in Europe to subordinate nature to man, out of Europe to subordinate man to nature."<sup>(a)</sup>

---

(a) See Buckle, *op. cit.*, Chapter II, p. 152.

The effects of education and religion in producing different types of mind have been so frequently portrayed and the fact is so widely recognised, that it is unnecessary to enter here upon a comparison of Christianity with Hindooism, Mahomedanism or Buddhism. We are tempted, however, to remark that where education has been entirely in the hands of a priesthood it would be contrary to all experience if the result were not to produce directly a superstitious type of intellect. Such are the consequences of the ascendancy of the Brahmins in India, and in Burma much of the Burmese superstition may doubtless be due to the fact that until quite recently the entire education of the people was carried on in the monasteries of the Buddhist monks. A parallel to this state of things may be found in the condition of Scotland in the eighteenth century when the clergy had monopolised all the sources of education both public and private, and hence though the country progressed industrially it remained superstitious and narrow-minded.(a)

4. We have dwelt on a number of considerations which may appear to some readers to have but a remote connection with differences of race. For ourselves, however, we do not see how it is possible to understand the lives and thoughts of a people unless the conditions under which they live are before the mind, and unless it is also pointed out what are likely to be the influences of such an environment. This has to some extent been done in the preceding section, and it is now proposed to review a few of the mental characteristics which the Eastern races, and particularly the Burmans, are usually considered to possess, and assign, so far as we are able, the reasons for their existence.

The aversion of the East to any change in its institutions has now become a by-word among us: it is exemplified in the caste-system of India, the upholding of custom (*ton-san*) in Burma, the unprogressiveness of China, &c., and the only exception to it that we know of is the modern civilization of the Japanese. The causes

---

(a) See Buckle, *op. cit.*, Vol. III, pp. 185, 288.

are easy enough to trace : the value of custom where might is right and justice is for the strong only, has been repeatedly pointed out,(a) the effect of a ruling priesthood in stereotyping views favourable to it, the absence of a motive for change where the climate is favourable and the nation is not migratory nor forced to come in contact with others in order to satisfy its needs ; the tendency of agriculturists to rest content with a living and the absence of the spur of commerce and foreign trade, these and many other causes doubtless contribute to the result we find. This state of existence is mentioned here rather to point out that the Western love of progress and reform is the exception rather than the rule, and that it is merely the fact that so many Europeans have had no experience except of their own country that leads them to think otherwise.

“The most remarkable fact,” says Sir Henry Maine, “is the relatively small proportion of the human race which will so much as tolerate a proposal or attempt to change its usages, laws and institutions. Vast populations, some of them with a civilization considerable, but peculiar, detest that which in the language of the West would be called reform. The entire Mahomedan world detests it.”(b)

Again the same writer says, “In spite of overwhelming evidence it is most difficult for a citizen of Western Europe to bring thoroughly home to himself the truth that the civilization which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears and speculations, would be materially affected if we had visibly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record.”(c) He also points out that we do not perceive this because of “our inveterate habit of confining our observation

---

(a) See *e.g.*, W. Bagehot, *Physics and Politics*, Edn., 1887, p. 54.

(b) Sir H. S. Maine, *Popular Government* Edn., 1890, p. 132.

(c) *Ancient Law*, Chapter II, pp. 22, 23.



of human nature to a small portion of its phenomena. When we undertake to examine it we are very apt to look exclusively at a part of Western Europe and perhaps of the American Continent. We constantly leave aside India, China and the whole Mahomedan East.”(a)

It is necessary to grasp this fact before attempting either to legislate for or understand the people among whom we come : it is a practice of the advocates which has come under our observation to argue their cases freely on grounds taken from English law, and it is also laid down by more than one legal writer that, in the absence of any definite guidance in the Indian Statute, the English decisions should be followed.(b) Yet it seems to be clear that it is unlikely that ideas which belong to so totally different a form of civilization would be suitable merely because the Statute contains no definite instruction which covers the case, and we, therefore, conceive that the proposition that where the Indian legislature has not provided for the case, English law should be followed, is likely to be a very unsafe one, and the decision in such cases would be far better left to the equitable sense of a judge who understands the people.

A defect of Eastern races which particularly strikes the European mind is their want of veracity. It has always seemed to us that to so great an extent does this prejudice some Europeans against them that it renders them blind to many good qualities which these nations possess, an unfortunate result which has done much to keep the two races apart, for to a mind which does not value this single virtue at so high a rate such wholesale condemnation naturally appears most unjust.

Yet, as the late Mr. Lecky points out, there is nothing so intrinsically great about veracity, in the sense in which we now employ the term, and it is only the force of circumstances which has led the Englishman to prize it so highly. “That accuracy of statement or fidelity to engagements which is commonly meant

---

(a) *Early History of Institutions*, p. 225.

(b) See *e.g.*, Ameer Ali & Woodroffe's 5th Edn. of the Indian Evidence Act, pp. 7-9.

when we speak of a truthful man, is usually the special virtue of an industrial nation, for although industrial enterprise affords great temptations to deception, mutual confidence, and therefore strict truthfulness, are in these occupations so transcendently important that they acquire in the minds of men a value they had never before possessed. Veracity becomes the first virtue in the moral type, and no character is regarded with any kind of approbation in which it is wanting. It is made more than any other the test distinguishing a good from a bad man.....The usual characteristic of nations where the industrial spirit is wanting (*e.g.*, the Italians, Spaniards or Irish) is a certain laxity or instability of character, a proneness to exaggeration, a want of truthfulness in little things, an infidelity to engagements from which an Englishman, educated in the habits of industrial life, readily infers a complete absence of moral principle. But a larger philosophy and a deeper experience dispel his error. He finds that where the industrial spirit has not penetrated, truthfulness rarely occupies in the popular mind the same prominent position in the catalogue of virtues. It is not reckoned among the fundamentals of morality and it is possible and even common to find in these nations—what would be scarcely possible in an industrial society—men who are habitually dishonest and untruthful in small things, and whose lives are nevertheless influenced by a deep religious feeling, and adorned by the consistent practice of some of the most difficult and painful virtues. Trust in Providence, content and resignation in extreme poverty and suffering, the most genuine amiability and the most sincere readiness to assist their brethren, an adherence to their religious opinions which no persecutions and no bribes can shake, a capacity for heroic, transcendent, and prolonged self-sacrifice, may be found in some nations in men who are habitual liars and habitual cheats.”(a)

We have reproduced this somewhat lengthy quotation because so much of it appears to us to apply to Eastern races, especially to the Burmese people, and because it not only appears to explain the want of veracity among them, but also at the same time to estimate correctly the whole character of such a people.

---

(a) E. H. Lecky, *History of European Morals*, Vol. I, pp. 137, *et seq.*

5. It may similarly be explained why the Burmans, for example, display so little forethought in ordinary life. For it is the industrial habits which bring forethought into prominence and it is only in an industrial civilization that prudence and forethought are regarded as duties. (a) From this spring consequences that are not at first apparent ; when it is deemed a crime to fail to provide for old age, misfortune, &c., there is no inclination in a nation to charity, and those who accept it in any form feel disgraced. But in a country like Burma it is freely given and received, and no stigma attaches to the recipient, and so it is possible for a people to be widely charitable without loss of self-respect on the part of those who are benefited. It is only under such circumstances that, in the words of the poet, 'it blesseth him that gives and him that takes.'

It may also be noticed here that the doctrine of 'natural and probable consequences' which has been discussed before (b) must mean a very different thing to a European trained in habits of prudence and to a man of Eastern race in whose country industrialism has had no influence, and who has neither been taught, nor had occasion, to regard forethought as either a virtue or a duty. Such a doctrine has more justification perhaps among a race, like the English, of the apathetic, as distinguished from the emotional type, *i.e.*, in which the practical intellect influences feelings and movements through ideas. That is the reasonable character where the intellectual tendencies have a real influence ; but this is not the Burman's case, and to introduce such a maxim of English law and apply it to a race of an emotional and totally different type is one instance of the great mistake of attempting to apply English legal notions to a race unsuited for them.

It has often been remarked, apparently with surprise, that the Burman love for animals and reluctance to take their life is not accompanied by any similar reverence for the sanctity of human life. Yet it is a mistake to assume that

Burman love for animals and disregard for human life.

(a) E. H. Lecky, *History of European Morals*, p. 140.

(b) See especially Chapter VIII, para. 9.



cruelty to animals necessarily indicates a habit of mind which leads to cruelty to men, or that a merciful disposition to animals always implies a gentle and amiable nature. Mr. Lecky quotes numerous instances to the contrary, including Domitian, Spinoza, several of the leaders of the French Revolution, the Turks, the Egyptians, and the Spanish race, and states that this contrast is found more or less in all Eastern nations.(a) The real explanation lies in the fact that the sanctity of human life is a Christian idea based on the fraternity of men in Christ, for nature does not tell man that it is wrong to slay without provocation his fellow men, and even moral societies have existed which have done it without compunction.(b)

Indeed, according to one view, Christianity is itself responsible for the fact that most Europeans display so little regard for the animal world. "One source of countless theoretical errors and practical blemishes, of deplorable crudity and privation, is found," says Haeckel, "in the false anthropism of Christianity—that is in the unique position which it gives to man, as the image of God, in opposition to all the rest of nature. In this way it has contributed, not only to an extremely injurious isolation from our glorious mother 'nature,' but also to a regrettable contempt of all other organisms. Christianity has no place for that well-known love of animals, that sympathy with the nearly related and friendly mammals (dogs, horses, cattle, &c.), which is urged in the ethical teaching of many of the older religions especially Buddhism. Whoever has spent much time in the South of Europe must have often witnessed those frightful sufferings of animals, which fill us friends of animals with the deepest sympathy and indignation, and when one expostulates with these brutal "Christians" on their cruelty, the only answer is, with a laugh: "But the beasts are not Christians." (c)

Burman fearless-  
ness of death.

On the same ground it is intelligible why Burmans do not appear to fear death and a capital sentence has little terror for the condemned criminal who sometimes does not even appeal from the sen-

(a) Lecky, *op. cit.*, Vol. I, pp. 288—90.

(b) *Ibid.*, Vol. II, pp. 17-18.

(c) E. Haeckel, *Riddle of the Universe*, Edn., 1903, pp. 125-6.

tence. This has been attributed to a kind of fatalism, but mainly because the true reason has been overlooked. Death actually has little or no terror for the Burmans, because it has never been regarded as a punishment in the same way as by Christians, among whom the Roman Catholic Church in particular taught that it is a penal infliction, and the associations connected with this have continued after men ceased to believe those doctrines. To the Burman death is but the end of one existence and merely the beginning of another, according to the Catholic teaching it was the beginning of endless sufferings and a punishment on account of original sin; when death has been held out as a terror for centuries it has naturally come to be regarded as such, but where the conditions have been different there is no reason why a similar view should have been adopted.(a)

One of the most admirable characteristics of the Burmans is their resignation in misfortune and the ease with which they submit to the inevitable. We do not attribute this exactly to fatalism, as is usually done by those who wish to disparage them, so much as to the influence of Buddhism as a religion of peace and the doctrine of 'Karma' which it preaches. It is possible to view this doctrine as fatalistic in character, but it is also clearly one which is in no wise intended to abolish the responsibility of the individual for his state in life. For the doctrine is that one's lot in life is the resultant of one's actions, which mould the man's character and predestine his circumstances. Indeed, it is said by one writer to have been adopted to retain the moral stimulus of a belief in a future life.(b) Apart, however, from the doctrine, the Buddha taught that life was full of suffering, and man must give up longings and resign himself to its ills, old age, illness, death and disease. Burmans appear to make a real attempt to carry out this precept, and this is one of the few points in which we are able to account for differences in conduct between a Buddhist and a Christian people by reference to their religion. For attempts to assign this as the explanation of differences in their conduct usual-

Contentment and  
resignation of Bur-  
mans.

---

(a) Lecky, *op. cit.*, Vol. I, pp. 208—12.

(b) F. C. S. Schiller, *Riddles of the Sphinx*, p. 384.

ly fail, for the simple reason that the morality which each religion teaches is the same. This has been recognised by Prof. James, who wrote :—" The sort of appeal that Emersonian optimism, on the one hand, and Buddhistic pessimism, on the other, make to the individual and the sort of response which he makes to them in his life, are in fact indistinguishable from, and in many respects identical with, the best Christian appeal and response." (a)

It may be that this feature of the Burmese character is also partly due to their lack of the impulse of rivalry and instinct of pugnacity. Mr. McDougall has pointed out that this impulse is very strong in Europeans and all warlike people, but it is absent in men of unwarlike races like the Hindoos and Burmese. Hence they are content with their equality even in poverty. The lack of the pugnacious instinct is conspicuous in the Indians, Burmans and Chinese, who have been subjected for ages to the rules of dominant castes which have established themselves in successive invasions from the central plateau of Asia. The bulk of the people are therefore patient and long-suffering and have no taste for war. In Burma and China especially they despise the military virtues.

For the same reason they are deficient in the social qualities which may be summed up under the word 'conscientiousness,' and which are the cement of societies and essential factors of their progressive integration. In societies formed by these peoples, the parts hang loosely together; they are but partially integrated and loosely organised. Conscientiousness is a virtue developed in war, where each man has to stand by the other. (b) It has often been observed that while individual Burmans will display great courage, a body of Burmans usually shows cowardice, and it has been found impossible to form regiments of soldiers from among them. They are quick to run away because each one suspects that his neighbour is about to flee, and this general lack of confidence renders combination among them unusual. The same charac-

Their lack of the power of combination and of conscientiousness.

---

(a) W. James, *Varieties of Religious Experience*, p. 34.

(b) W. McDougall: *An Introduction to Social Psychology*, pp. 114-5, 290-2.



teristic is displayed in trade : Burmese partnerships rarely succeed as the partners do not trust one another, and indeed some appear to be so short-sighted as to regard such relationships as opportunities for swindling. Similarly their conspiracies fail, partly because their childishness lets the secret out, but mainly because they have no loyalty to each other, and when difficulties arise, each plays for his own hand. We think that it is this want of the power of combination and lack of the impulse of rivalry that are the chief reasons why Burmans fail in competition with other races, and will cause them eventually to be pushed out of their own land.

6. In this and the preceding chapter we have confined ourselves less strictly to the purely psychological treatment of what has come under review, but the subjects dealt with have been none the less sufficiently concerned with psychology to warrant their introduction in this Volume. An analysis for example of the sentiment of justice can hardly be complete without some reference to moral philosophy, and the same may be said of responsibility.

It is in accordance with our system to refuse to recognise hard and fast lines between different departments of knowledge, and though it is necessary to separate off some sciences for the convenient study of special phenomena, the opportunity of applying the results of such studies *inter se* we hold should always be taken. The failure of the lawyers to appreciate the value of this method is what has contributed so largely to make the law a water-tight compartment cut off from all connection with the streams of knowledge outside it.

## APPENDIX I.

*Some examples of the unduly narrow and restrictive interpretations of the law. (See Chapter II, paragraph 5.)*

1. UNDER section 8 of the Indian Evidence Act the conduct of a party or agent to a party, is relevant, if it influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. Conduct does not include statements, unless those statements accompany and explain acts other than statements. When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects such conduct, is relevant.

The lawyers have ruled the following restrictions: "If such conduct influences or is "influenced" means "if such conduct directly and immediately influences or is influenced" *R. v. Abdullah*, 7 All., 395, 396 (1885). The bad results of such a restriction—which does not exist in the Act itself—have been illustrated in our chapter on causation.

As regards statements accompanying and explaining acts, in the same case it was said by Petheram, C. J., that this covered cases in which a person was found making such statements without any question first being asked him; but when the statement is made merely in response to some question or objection it shows a state of things introduced not by the fact in issue, but by the interposition of something else. The effect of this would apparently be that if a man had been stabbed and ran down the street calling out that *A* stabbed him, this would be relevant; but if as he ran some one asked him how he came to be stabbed or whether *A* stabbed him, and he replied that *A* stabbed him, it would not be so. There is nothing to justify this in the Act. It is sometimes said that the declaration and act must be by the same person (*Howe v. Malkin*, 27 W. R. (Eng.) 340), though this does not seem always to be observed. But though in cases of conspiracy, riot, etc.,

it has been held that the statements of all concerned in the common object are admissible, it has also been ruled that unless some common object has been proved, the declarations of participants, if neither parties nor agents, are inadmissible (*R. v. Petcherini*, 7 Cox, 79).

2. A confession by an accused person while in custody of the police cannot be proved against him (section 26), but it is enacted in section 27 of the Indian Evidence Act as follows :—“Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered, may be proved.”

The commentators (Ameer Ali and Woodroffe's Edition, page 269) start with the remark that as this section is a qualification of the imperative rules contained in sections 24-26, it must be strictly construed. They then proceed that the fact discovered must be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made. “Other statements connected with the one thus made evidence, and thus *mediately, but not necessarily or directly, connected with the fact discovered, are not admissible.* (*R. v. Jora Hasji*, 11 Bom. H. C. R., 242). No judicial officer (dealing with the provisions of this section) should allow one word more to be deposed to by a Police-officer, detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. The 27th section was not intended to let in a confession generally, but only such particular part of it *as set the person, to whom it was made; in motion, and led to his ascertaining the fact or facts of which he gives evidence.*” (*R. v. Babu Lal*, 6 All., 509, 546 (1884) *per* Straight, C. J.)

Apart from the unnecessary restrictiveness of these directions and the perversity of attempting to cut up transactions which are wholes into pieces in this manner, we can find no warrant in



the words of the Act for the restrictions conveyed in the passages italicised.

It is next attempted to limit the meaning of 'discovered' to that of finding upon a search or inquiry of articles connected with the crime or other material fact, on the ground that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true (Ameer Ali and Woodroffe, p. 270). It is denied that it includes the purely mental act of learning something which was not known before to a person. Yet we do not see why, if, *e.g.*, in a case of criminal breach of trust, some statement of the accused led to the elucidation of some accounts in a sense pointing to his guilt, this would not be a discovery within the meaning of the section.

It is then laid down that statements made by the accused while pointing out the scene of crime are not admissible, as there is no such discovery as is required by the section, nor yet under section 8 already quoted as explaining his acts. Likewise in the case of statements accompanying production of articles, for the same reason. As regards the words "in consequence of information" it used to be held by the Bombay and Allahabad Courts that when an article said to be connected with the offence was produced by the party himself after giving information in respect of it, the article could not be said to be discovered 'in consequence of the information,' as it was discovered by the act of the party (*R. v. Pancham*, 4 All., 198, 204; *R. v. Babu Lal*; *R. v. Kamalia*, 10 Bom., 595, 597). This, however, has been overruled, so far as the Bombay Court is concerned (*R. v. Nana*, 14 Bom., 260), on the ground that the statement of the accused set the police in motion and led to the discovery of the property.

In connection with how much of such information may be proved it is said:—"The discovery proves not that the whole, but that some portion of the information given is true, namely, so much of the information as *led directly and immediately to*, or *was the proximate cause of*, the discovery . . . . only such portion of the information is admissible" (*Ib.*, p. 273). It is added that other statements "*immediately* but not necessarily or directly connected with the fact discovered are not to be admitted."

We really do not see any authority for the words italicised (by the commentators) in the Act, and we have had occasion to remark on their mischievousness in the chapter on Causation.

3. Section 30 of the Indian Evidence Act runs "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

"Offence" as used in this section includes the abetment of, or attempt to commit, the "offence."

For what follows see pages 279-90 of Ameer Ali and Woodroffe's 5th Edition of the Act.

It has been ruled that an accused who pleads guilty and is thereupon convicted cannot be said to be "jointly tried" with the other prisoners, though if his plea is not accepted by the Court he is still being jointly tried with them.

That the same offence means an offence coming under the same legal definition, though it would seem plain that two men might take different parts in what is really the same offence which would cause them to be tried under different sections of the Code.

That the confession must implicate the confessing person substantially to the same extent as it implicates the person against whom it is to be used (*R. v. Belat Ali*, 19 W. R. Cr., 67), and, if it does not, the statement will be entirely excluded according to the rulings of the Calcutta and Allahabad High Courts. Yet clearly the degree to which the confession implicates each person is a matter for consideration by the judge trying the particular case, and to make a general rule to the effect that the statement must be excluded if it does not implicate the maker and the others equally is a restriction unauthorised by the law.

Similarly with regard to another ruling that such a confession cannot stand higher than the evidence of an accomplice and therefore needs corroboration for a conviction. In fact the Courts have laid down a number of restrictive rules with reference to

these confessions, none of which have any basis in the law that we can find. They are as follows :—

- (a) That such a confession alone will not sustain a conviction.
- (b) That confessions of co-prisoners, to be rendered trustworthy must be corroborated *aliunde* by independent evidence and not by the testimony of accomplices or approvers, as well in respect of the identity of all the persons affected by it as of the *corpus delicti*.
- (c) That confessions of prisoners are not sufficient corroboration of the testimony of an accomplice, either as to the *corpus delicti*, or the identity of the persons affected.

However valuable such opinions might be as advice, if offered in a treatise or handbook on the law of evidence, they are simply pernicious when given in the form of rulings which as such are converted into part of the law. These are matters which evidently vary in different cases, and it is of the highest importance to leave the judge free as to how he should regard such confessions in the light of the facts of each case. To attempt to tie him down by rules of general or universal application is merely to hinder him in his efforts to discover the truth.

An attempt is made further to distinguish between “taking into consideration” and regarding as evidence, and to try and argue that taking into consideration means giving less force to as against the accused. It is stated that only a *witness* can give evidence according to the definition of that term in the Act, and therefore the confession of the accused must be something else than ‘evidence’ as against the other accused. This is used as a foundation for the argument that such confessions must be corroborated in order to sustain a conviction. Surely this type of argument and restriction is on the wrong tack. There is no real distinction, other than a verbal one, between ‘considering’ and treating as evidence : whichever you do it is merely weighing with a view to coming to a conclusion, and anything will tend to convince or fail to convince



equally whether you dub it evidence or something which is less than evidence which you are considering. It is just one of these technical distinctions which are impossible of real application, and as their result only make Magistrates nervous and give a handle to advocates to talk in the Appellate Court.

4. Under section 32 (2) of the Act statements made by a deceased person in the ordinary course of business and entries made by him in books kept in the ordinary course of business are admissible in evidence.

The use of this permission has been restricted in English law by the ruling that it only applies to those things which, according to the course of business it was *the duty* of the person to enter and not to independent collateral matters however intimately any such collateral matters may be incorporated in the statements (*Chambers v. Bernasconie*, 1 C. M. and R., 347; *Taylor Ev.*, sec. 705). Thus the question was whether *A* was arrested in a certain parish, and a certificate annexed to the writ by a deceased sheriff's officer stating the fact, time and place of the arrest, returned by him to the sheriff, was held inadmissible on the ground that the duty merely required the fact and time, but not the place of the arrest to be returned.

It is difficult to see what was gained by the judges who wantonly deprived themselves of this source of information. Whether this restriction would be followed in India or not, is not clear from the words of the Commentators.

5. Under section 32 (5) statements by deceased persons as to any relationship by blood, marriage, or adoption are admissible if they had special means of knowledge, and under cl. (6) statements on the same subjects made in wills, deeds relating to the affairs of the family to which such deceased person belonged or in any family pedigree, etc., are admissible.

Now in English law there are numerous restrictions on these points. Thus declarations must be by deceased *relatives* and are admissible only to prove matters of pedigree. They are relevant only in cases in which the pedigree to which they relate is in issue, not in cases in which it is only relevant to the issue. So where the question was whether *A* sued for the price of horses an

pleading infancy was on a certain day an infant or not, the fact that his father stated in an affidavit in a Chancery Suit to which the plaintiff was not a party, that *A* was born on a certain day, was held to be irrelevant.

Again, hearsay evidence must be confined to such facts as are immediately connected with the question of pedigree, and incidents which, although inferentially tending to prove, are not immediately connected with the question of pedigree will be rejected. The statements also must be made by deceased relatives who are *legitimately* related (Ameer Ali and Woodroffe, pp. 321-2). All these restrictions greatly narrow the applicability of this part of the law and deprive it of much of its utility, and it is not clear why they are necessary, as they appear to have been dispensed with in the Indian law of evidence.

6. According to section 92 of the Evidence Act no evidence of an oral agreement or statement is admissible to contradict, vary, add to or subtract from the terms of a contract, grant, or other disposition of property which has been reduced to a document. This is subject to several provisos, one of which allows fraud on the part of a contracting party to be proved.

From this section much difficulty has arisen with reference to cases which have been described in the document as sales when the agreement really was that they were to be mortgages. The real fact is that this provision of law is unsuitable to such cases and should be amended so as to exclude them, but the lawyers have tried to tackle the matter by drawing fine distinctions which let in parol evidence in some cases. Thus they first held that though no evidence of any *oral* agreement or *statement* can be admitted evidence of *conduct* can be, to show that an apparent sale was really a mortgage, and that, therefore, parol evidence is admissible to explain the acts of the parties. (*Kashee Nath v. Chundy Churn*, 5 W. R., 68, 72.) Doubt, however, was thrown on this ruling by the decision of the Privy Council in *Balkishen v. Legge* (22 All., 149, 1889), that oral evidence of intention was inadmissible, though the Calcutta High Court in *Khankur Abdur v. Ali Hafez* (28 Cal., 256, 1900) distinguishes between mere oral evidence of intention and evidence as to the acts and conduct of the parties. But the

the Bombay High Court in *Dattoo v. Ramchandra Totaram* (7 Bom. L. R. 669 1905) ), expressed a different view, and also the Madras High Court in *Achutaramaraju v. Subbaraju* (25 Mad., 7, 1901), stating very truly that evidence of conduct could be relevant only by reason of the fact that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the deed was to operate in a different manner than it purports to operate.

Then, again, the case of *Baksu Lakshman v. Gobinda Kanji* (4 Bom., 594, 1880), went on a different line, viz., that a party should not be permitted to *start* his case by offering direct parol evidence of such oral agreement, but if it appears clearly from the *conduct* of the parties that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage. The judge also argued that such conduct would amount to fraud, and therefore the proviso referring to fraud would allow oral evidence. But here again the first of these grounds has been dissented from in the case of *Rakken v. Alagappudayan* (16 Mad., 80, 82, 83) for the reason that while it lets in indirect evidence of the true agreement, notwithstanding section 92, direct evidence of the same is not admissible.

As regards the ground of fraud it has been held in *Banapa v. Sunderdas Jagjivandas* (1 Bom., 333) that the fraud referred to in the proviso must be fraud contemporaneous with, and not subsequent to, the making of the document.

All these various and contradictory decisions of course have left the law on the subject very uncertain. They attempt to distinguish between 'conduct' and 'statement to explain acts' and between direct and indirect evidence of the existence of contemporaneous oral agreements. They are only actually restrictive in character in so far as some of them restrict the meaning of fraud in the proviso to the section to fraud contemporaneous with the making of the document, but they are all due to the spirit which seeks to overcome difficulties by introducing fine distinctions. It should have been apparent at the outset that this could not be a successful way here but that an amendment of the broad principle was required.



7. When in a document the description of the person or thing is partly applicable and partly inapplicable to each of several subjects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's intentions will be inadmissible in English law (*Doe v. Hiscocks*, 5 M. and W., 363). There appears to be no adequate ground for such a restriction, and no difference is made in the Indian law between evidence of intention and other oral evidence in such a case.

8. In English and American law the parents are incompetent to prove non-access when the legitimacy of a child is in question, which latter fact must be established by circumstantial evidence only. (Ameer Ali and Woodroffe, p. 704.) If it is considered advisable to have such a restriction on grounds of policy, morality, etc., this view was not followed when framing the Indian Evidence Act, section 112, and it seems probable that its effect would be in some cases to render an important fact incapable of proof.

9. According to section 133 of the Indian Evidence Act "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." This, so far as we know, contains the whole of the law in India relating to accomplice evidence, but, as in the case of confessions, the judges have delivered a number of rulings in derogation of the above provision, all in the nature of restrictions which have become a kind of supplementary law. We object to these glosses being regarded as the law for the reasons stated with reference to confessions, see para (3) *supra*. Thus it is ruled:—

- (a) Where a witness admits that he was cognisant of the crime as to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice. (*R. v. Chandallinee*, 24 W. R. Cr. 55). This actually extends the restrictions relating to accomplice evidence which the Courts have created to what is not really accomplice evidence.

- (b) An accomplice is unworthy of credit against an accused person unless he is corroborated in material particulars in respect to that person. (*R. v. Magan Lall*, 14 Bom., 115, 1889), which states that this has become a rule of practice of almost universal application.
- (c) There must be corroboration of an accomplice's evidence both as to the persons spoken of and the *corpus delicti* pointing the same way (*R. v. Chatur Purshotam*, 1 Bom., 476 note).
- (d) The evidence of one accomplice does not corroborate the evidence of another.
- (e) Previous statements made by an accomplice himself, though consistent with his evidence given at the trial, are insufficient corroboration.
- (f) The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others, because such a confession cannot be put on a higher footing than that of an accomplice.

As advice, to be followed or not as the particular circumstances of the case being tried dictated, we should have no objection to such dicta : but as converted into part of the law and treated as of general application, which is the way in which they are employed in India, they are more often obstacles than aids to the discovery of the truth. It is also clearly outside the real province of judges to legislate in this manner inconsistently with the existing provision of the law.

10. Where the certificate attached to a confession was not written on the day on which the confession was recorded, it was held that the confession could not be received in evidence (*Reg. v. Daji Narsu*, 6 Bom., 288). This seems an unnecessarily narrow view to adopt, particularly as section 533 of the Criminal Procedure Code enacts that, if any provisions relating to the recording of confessions have not been fully complied with by the Magistrate recording the statement, the Court shall take evidence that the person duly made the statement recorded and it shall be admitted.

11. It is held that when a case is heard by a Court, which has no jurisdiction, the proceedings are void and there must be a new trial. So much so that even the consent of the parties cannot give jurisdiction and the question of jurisdiction may be raised at any time, in the original Court or on appeal, and even by the party which brought the suit in the wrong Court. (*Deno Nath v. Adhor Chunder*, 4 C. W. N., 470 (1900); 3 C. W. N., 591). Yet it seems to us that in many cases in which the parties in ignorance bring and defend the suit, and the judge also in ignorance *bonâ fide* tries it, and the Appellate Court sees no reason to think that justice has not been done, a new trial is quite unnecessary. Such cases are more frequent than might be supposed owing to the real difficulty sometimes of deciding in India whether a case is a Civil or Revenue one. It clearly ought to be left to the discretion of the Appellate Court to order a new trial in such circumstances when justice appeared really to require it and not otherwise.

12. Under section 33 of the Evidence Act the evidence given by a witness in a judicial proceeding is relevant for proving in a subsequent proceeding the truth of the facts stated therein, if the witness is dead, or cannot be found, or is incapable of giving evidence. It has been ruled that the evidence of a witness given in a proceeding before a judge or magistrate who had no jurisdiction, and which was thus pronounced to be *coram non iudice* cannot be used under this section on a re-trial before a competent Court. (*R. v. Rami Reddi*, 3 M., 48, 1881.) The law thus prefers to dispense with a necessary aid to the truth rather than forego its strict adherence to its forms of procedure.

13. It seems to be established as the result of the Privy Council ruling in *Subramania Iyer v. Rex* (25 Mad., 61) that in case of misjoinder of charges the proceedings must be overturned and the irregularity cannot be cured under section 537 of the Criminal Procedure Code. Yet there must be many cases in which the guilt of the accused was so plain, in spite of the wrong joinder of charges, that the quashing of the proceedings is quite unnecessary in the interests of justice, and it should be sufficient to adopt this course only when it appears that a miscarriage of justice may really have resulted from the error.



## APPENDIX II.

*On the failure of the law to adapt itself to the progress of the times and the conditions around it.*

In an article entitled "Philosophy and our Legal Situation," by Prof. H. A. Overstreet, in Vol. X, No. 5, issue of the Journal of Philosophy, Psychology and Scientific Methods (February 27th, 1913), the causes of maladministration of justice in America were reviewed. The chief reason he traced to the fact that the legal system there is wedded to a philosophy which has long since been abandoned in the other social sciences, but to which the law still clings. This philosophy was bound up with the theory of natural rights on which the English common law was founded, from which the American legal system is derived. It was evolved as a means of protecting the individual against oppression bodily, or through his property, or family affections or religious convictions by the aristocratic and theocratic organization of the society of that time. In those days the clergy and the nobility were the strong classes and in resistance to them the theory was developed that all men are born free and politically equal and it is their natural right to remain so: that since men are by natural right equal, no one can have any right to encroach on another's equal right, among these rights being those of life, liberty, property and the pursuit of happiness: and that political rights are based upon contract. From the last principle was derived the view that the state cannot encroach on the wills of the individuals save in so far as they have consented to such encroachment and that therefore the power and authority of the state are to be jealously restricted. The chief concern of the law is the preservation of the rights and privileges of each individual.<sup>(a)</sup> Prof. Overstreet then points out how in America the situation has completely changed. Whereas in the eighteenth century the political order was oligarchic, while the economic order was democratic—small producers and manufac-

---

(a) Blackstone, Commentaries (Wendell), p. 138.

turers, an easy transition from employee to employer, wealth very widely distributed, economic opportunities relatively equal; in the nineteenth and twentieth centuries the conditions have been exactly reversed. The economic order is now conspicuously oligarchic: through the introduction of complex machinery and the concentration of industries, the small producers and manufacturers have become hired workers and there is now a wide gulf between employers and employed; wealth is concentrated in the hands of a few and economic opportunities are exceedingly unequal. The class which is now the danger to the liberty of the common man is not, as in the 18th century, the political ruling class, but the economically regnant class. It is the vast economic powers which tend to override the legislature and defy the common will by its sovereignty of economic compulsion. How then has the law adapted itself to the changed state of affairs?

It has simply entirely failed to adapt itself and in consequence has become an instrument of oppression. "It is not surprising then," says the writer, "that a theory embodied in the common law and stated expressly in the constitution which once served for the protection of the common man has become increasingly the instrument of his oppression. As a distinguished jurist has recently expressed it, 'To-day for the first time the common law finds itself arrayed against the people; for the first time instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire.... There is a feeling that [the common law] *prevents everything and does nothing*.... It exhibits too great a respect for the individual and for the intrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age.'"(a)

Prof. Overstreet gives as some instances of the failure of the law several recent decisions of the American High Courts of Appeal as follows:—

- (1) That a law passed to prohibit the manufacturing of cigars in the home, which was framed in view of social welfare

---

(a) R. Pound. "Do we need a Philosophy of Law?" Col. Law Rev., Vol. V, p. 344.

and the welfare of those whom it prohibits from sweatshop work, is invalid because it restricts the workman in his liberty of choice as to the place and manner in which he is to earn a livelihood. This decision while protecting the worker against his apparent enemy the state, delivers him over bound to his real foe the sweatshop manufacturer.

- (2) An enactment prohibiting the payment of workmen in anything except money, was decided to be wholly unconstitutional and void, as preventing persons who are *sui juris* from making their own contracts. They are at liberty to sell their labour for what they think best.(a) Here again while ostensibly defending the right of the individual labourer and placing him as a free individual with 'rights' on a par with his employer, the court is in fact exposing him more fatally to the oppression of unscrupulous employers. For the law ignores or does not acquaint itself with the vicious widespread system of payment in company orders or in truck store goods or in forms of vague promises and the weakness of the individual labourer to protest against such forms of payment.
- (3) An Act restricting the number of hours of work per day to eight (*ex parte* Kubach, 85 Col., 274), is pronounced null and void, on the ground that it is inconceivable that it could rightly be made a misdemeanour for one of its citizens to contract with another for services to be rendered because the contract is that he shall work for more than a limited number of hours.

The Court never realises that in the existing conditions the permission given to each individual to contract as he pleases as to number of hours is really a power given to employing agencies to compel as long hours of labour as they possibly can. Here, as in the other cases, the legislature is seeking to protect the common man while the Court protesting against legislative inter-

---

(a) Godcharles and Wigeman, 113 Pa. St., 431.



ference with his individual "rights," in fact, exposes him to the exploitation of employers.

- (4) An Act requiring that wages due be paid on the day of discharge, is pronounced null and void, because "the patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder him from employing these in what manner he may think proper, without injury to his neighbours, is a plain violation of this most sacred property.(a)" The true meaning of this is that the poor man is not to be deprived of the inestimable privilege of agreeing with his employer to wait patiently six months or a year or more for money due to him at the time of discharge.

The writer's comments on the law in this connection are these :—

"Only the law (may we not say it), unwitting in its scientific isolation, laggard in the swift race of research, still worships devotedly at the otherwise abandoned shrine" (*i.e.*, the theory of natural rights).

"Such is the condition of our present day. The well-nigh universal, oft-times violent criticism of our courts, where our undemocratic economic philosophy is displayed to us in its most uncompromising form, the social weepings and gnashings of teeth over decisions that hinder the prosecution of our earnest endeavours for human welfare, are indications of our growing dissatisfaction with the national theory that is ours."

"In view of this, then, we may see how lamentably our courts are situated. They are perforce the spokesmen and executors of a social philosophy which even now, as a people, we have ceased in any vital or consistent sense to hold. They are sworn to the service of this older view, sworn to declare its outworn principles, to work havoc with its ill-adjusted

---

(a) *Leep v. St. Louis, I. M. & S. R. Co.* (1894), 58 Ark. 407.

machinery, sworn to a service which they may not abandon until, perchance, the old shall abdicate its right and make way for the more adequate new."

In similar language another American writer Mr. M. R. Cohen criticises the existing state of the law as follows :—

"This requirement that the law should be rational, *i.e.*, deducible from established principles, compels the law to assume the form of a deductive science. But this deduction soon becomes an end in itself and is frequently pursued in flagrant contradiction with the ends of justice. Thus there results what Prof. Pound has called Mechanical Jurisprudence, *i.e.*, a jurisprudence in which deductions are made from concepts without taking into account the question whether changing conditions have made them no longer applicable. A distinguished jurist, Windscheid, speaks of 'the ancient, never ending dream that there is a peculiar rigid and unchangeable body of legal rules which follow from pure reason and are necessary for all times and for all places.' It is this false intellectualism which under the guise of natural rights is in the United States to-day stifling all progressive social legislation."

And again :—"when under the influence of British Empiricism, conscious philosophy of law was almost ridiculed out of existence, the door was left open for the antiquated individualistic natural rights philosophy of the eighteenth century, as embodied in text books like Blackstone. As narrow empiricism always terminates in vicious intellectualism, so the pseudo-philosophy of Blackstone with its ante-evolutionary view of society and of an unalterable standard of justice, has gained sway over the minds of our lawyers and judges, with the result of making our administration of justice a national scandal." (a)

---

(a) Jurisprudence as a Philosophical discipline, M. R. Cohen, the Journal of Philosophy, Psychology, &c., Vol. X, No. 9, 24th April 1913, pp. 228, 230.

2. It appears to us that what has preceded is merely an expansion and proof of the words written by us in the first edition of this work in the year 1906. We then said "yet without the aid of philosophy it is difficult to meet new situations, and there are signs that a new situation will have to be met even in the conservative realm of law. Men are chafing under the restraints of the present system: they feel that it is antiquated and has failed to adapt itself to the march of the times, and that what should be the servant of their social needs has become instead a tyranny and an anachronism that cramps their progress. When the face of the world is beginning to alter and with fresh knowledge and discoveries ideas are changing, it is useless for lawyers to be guided by their old maxims and to repeat the old saws that were framed to suit the circumstances of a by-gone generation. It is perceived that there is need of reformation in law and that reformation must come from outside, for the lawyers themselves are not the persons to accomplish it." (a) We could scarcely wish for a stronger confirmation of this view than the description of the legal situation in America as given by Prof. Overstreet in 1913.

But it is not in America only that this situation exists: it exists in all countries that have taken their law from or are influenced by English law. The same change has taken place in the economic situation in England and the same battle is going on now with regard to economic legislation and the rights of trade unions to combine and the objects on which they may spend their funds. The principle of communal co-operation in England also is superseding that of individual rights, and the law has shown itself hopelessly inadequate to deal with the excesses committed by strikers and trades unions. This same natural right theory has been the means of oppression by which "peaceful picketing" and other measures for terrorizing society have been practically legalised by our courts. Under its ægis moon-lighting and boycotting have flourished in Ireland until landowners have been forced to abandon their property in despair. It is the law courts which, as usual, have stood in the way of stopping blackguardism and

---

(a) The passage is reproduced at pp. 5, 6 of the present edition of this work.



resistance to established authority. To use the words of Professor Overstreet the law "prevents everything and does nothing," *i.e.*, it prevents the execution of the measures needed to stop the social evil and does nothing itself to remedy the situation. If we are to rely on the law as at present administered for aid, things will simply drift until anarchy appears which will then have to be suppressed by the rifle and bayonet.

3. And what of the situation in India? Has the law been found adequate to suppress sedition? We venture to think that what success has been achieved here, has been achieved in spite of the law. Here again the law has "prevented everything and done nothing." It has hampered the executive officers in their endeavours to combat sedition by awarding absurd damages against them for alleged unlawful searches, and it has been persistently employed by the seditious public as a means for delaying preventive measures ordered by the executive officers until the season has passed when their execution would be of any avail. The High Courts have in some instances gone very near to accepting a theory that the subject has a "natural right" to be seditious provided that he calls it by the name "swadeshi" (a); and they have completely failed to realize that, to insist on the natural right of the subject to act as he pleased in a country where all were of one race and the poor man needed protection against the rich and powerful, was a totally different matter from upholding the liberty of action of the political agitator whose aim is the overthrow of the one form of Government which protects all classes alike.

So far from grasping the true nature of the situation for which a legal remedy is required, opposition to such measures as have been proposed by Government, has come conspicuously from the legal profession. Whether it has been an act to curb the seditious utterances of the press or to prevent seditious meetings or to deport seditious agitators, the spectacle always arises of the lawyer getting up in council or pressing his representations on Government and asserting that such a measure is unconstitutional. Too often he succeeds in emasculating the measure by the use of such shibboleths as "the liberty of the subject" "the liberty of conscience,"

---

(a) The meaning is roughly equivalent to 'patriotism.'

and so forth, and he has in fact proved himself to be the most powerful ally of the forces which are ranged against law and order in this country. Yet in practice he is the worst type of adviser that could be found. Not merely does he paralyse action by invariably suggesting a legal difficulty, but his legal difficulties are all based on the antiquated theories as to the natural rights and liberties of the subject which formed the basis of the English common law of the eighteenth century. Is there any reason to suppose that an Eastern country, which does not hold the view that all men are politically equal, will rightly be governed by adherence to fossilized theories of this nature that never at any time had application to the circumstances of the country to which the lawyer now seeks to transfer them ?

And again what of this legal profession itself and the whole attempt to treat it in India as if it were an equivalent of the Barrister profession in England ? Surely this attempt has been a long history of mistakes on the part of our judges, and the courts here have never realised the type of men with whom they actually have to deal because of their blind adoption of the theories relating to the English bar. Rules of evidence which may be of some value when applied by men of character, intellect and broad education, become merely a means of raising endless objections and interminable arguments in the hands of the narrow minded pettifogging pleader who in this country is restrained by no condemnation on the part of his fellows. But the courts, either oblivious of the actual situation or fearing to show their appreciation of it, instead of repressing such garrulosity with scant courtesy, pay an excessive reverence to the affidavits, objections and quibbles put forward by these men and, because a few of them possess the title of barrister, allow the whole class to ape the position of legal counsel in England. Hence the simplest cases are protracted to enormous lengths and misrepresentations are freely made in open court without incurring the censure which they deserve. Yet surely it should be obvious that a procedure which depends for its success on certain qualities on the part of those who employ it and the special surroundings in which they work, will be certain to fail when it is put in the hands of others who do not possess those qualities, who are not restrained by the same feelings or a similar



public opinion, and who combine the legal profession with the occupations of money-lender, agitator, trader, bill collector, broker, newspaper editor and anything else which they find profitable.

Owing partly to the license allowed to the advocate class trial by jury is becoming a farce in India. The opening scene consists of a violent endeavour on the part of all those who are men of any position to avoid the jury box because of the excessive length to which they know by experience the advocates will be allowed to drag out the case. Every kind of excuse is therefore alleged to obtain exemption. The next act is the challenging of the respectable men who remain on the list after failing to obtain exemption, under the numerous grounds allowed by the law which in addition permits eight persons to be challenged without any grounds being stated. After this process has been completed the chances are great that out of those who remain a certain number will either be open to influence or to be misled by the misrepresentations of the advocates. Hence the acquittal that so often results in spite of the strongest evidence against the accused. If however a conviction should take place this is often by no means the end of the case. Although in theory there is no appeal from a decision of a jury, by use of the section giving power to reserve and refer questions for the decisions of a Bench (a), and again of a special provision of certain Acts under which, on a certificate of the Government Advocate, points may be referred to a Bench as "needing further consideration" (b), the whole case is practically re-opened and argued for days before several judges of the High Court (c). This is nothing less than an appeal and, if it succeeds, a retrial becomes necessary; but Government is generally by this time so tired of this travesty of justice that it enters a *nolle prosequi* and so ends the matter. The law is thus brought into contempt: nor could this spectacle be entirely avoided, if the judges were confident enough to decline to reserve such questions, or the Government Advocate strong enough to refuse a certificate. There still remains the Privy Council which allows itself to be used

---

(a) Section 434, Criminal Procedure Code.

(b) For example section 12 of the Lower Burma Courts Act, 1900.

(c) In the case of *K.-E. v. G. Clifford and 2 others*, 1913, it was argued before a bench of the Chief Court Lower Burma for ten days.



as yet another Court of Appeal, even after the High Courts in India have at last disposed of the matter. The hearing of the appeal before this august upholder of the natural rights of the subject may take place without reference to the length of time which has elapsed since the conviction was had and rarely comes on less than six months from that date and often much longer. Thus so far from there being no appeal from a conviction by a jury, the Indian law has been so framed as to permit no less than three appeals, and all that is required is sufficient money to employ an advocate to argue them. Meanwhile the public looks on amazed that such protraction of a case should be possible and the convicted accused on bail goes comfortably about his usual business.

Either it has not yet dawned on our courts that the jury system itself or the procedure under which it is conducted is not suited to this country, or, if they recognise this, they have taken no steps to introduce a reform. At intervals the Criminal Procedure Code is amended but the part of it relating to trial by jury remains untouched, because it is known that any real attempt to make it useful to India would be opposed by the legal profession as an interference with this most sacred and time-honoured institution—of another country.

Again we would refer to the use made of the idea of freedom of contract as a ground for opposing all forms of agricultural legislation in India. We do not think that it will be an exaggeration to say that all forms of Tenancy and Land Alienation legislation have been violently opposed by the lawyers simply from the point of view that the restrictions, which they necessarily involve, constitute an interference with freedom of contract. They never stop to consider that freedom of contract, which may be of the highest importance to a nation which lives by commerce, may be unsuited to a population of uneducated poverty-stricken ryots who live not by commerce but by agriculture. Obsessed with their fetish of natural rights of the individual, they would sooner see the land pass out of the hands of the people of the soil into the grasp of the extortionate money-lender, than fail to give effect to the most unconscionable bargain or restrain the ryot from alienating his land—which is his sole source of living—in perpetuum. They prefer to

see the tenant working the land at a rack rent which will ensure his insolvency, rather than admit on to the Statute book a provision which will have the least effect in restraining the limit of rent which he may contract to pay. We do not doubt the sincerity of this opposition : they honestly think that this antiquated idea taken from the notions prevailing in another country over two centuries ago must be the *summum bonum* of the agriculturist in India at the present time.

Lastly the subject of mixed marriages is one of a different type, but in which the law has conspicuously failed to adapt itself to changed circumstances. In its issue of May 12th, 1913, the *Times* referred to a case in which a Parsee married an English woman in England and deserted her and the wife petitioned in vain in India for restitution of conjugal rights. The High Court of Bombay held that it could only deal under its charter with the matrimonial matters of persons professing the Christian religion,(a) commenting on this the *Times* remarked :—" Surely jurists ought to be able to devise remedies which, while not offending racial prejudices or religious convictions, would punish or defeat flagrant wrong." But such cases have been occurring now for many years and the jurists have devised no remedy for them, nor, so far as we know, have they any desire to do so.

We may add the case of Hindus who marry Burmese women, a common occurrence in some parts of Burma. As the result of the maxims of Hindu law "once a Hindu always a Hindu," and, "A Hindu may only marry a Hindu," which the Courts rigorously enforce, most unjust results follow. The Hindu has left his country and became domiciled in Burma and taken a Burmese wife according to the marriage customs in Burma, and has lived with her for years and treated her as a wife. She has been recognised as such by the people of the country in which they are living, yet on his death his property is claimed by distant relatives in India and the children get nothing, on the ground that the mother not being a Hindu could not be legally married to a Hindu. Or again some one may commit what is nothing less than adultery with the woman and the man, who is in fact her husband, has no remedy

---

(a) Case of *Naserwanji Pestonji Wadia*.

against him because the courts hold that she is not his legal wife. It is clear that the strict application of the law of the Hindus of India is unwarranted and unsuitable in the case of those who have crossed the water and abandoned their caste and adopted other customs in another land. Yet the courts, careless of wrongs however great, will not abate one jot or tittle of the letter of the law. They prefer to continue to be the instruments of the most flagrant injustice, satisfied that their legal duty has been faithfully performed.



## INDEX.

	PAGE.
ABNORMAL minds, conditions of, described .. ..	390-1, 435
Aboulia .. ..	419-20
Abstractions, abuse of, in law .. ..	12-13, 16, 248-9, 261
Accomplice evidence, corroboration of, 80, 192-3, 570, 575; and repetition	193
Action, determined by feeling, 98-9 and belief, 320 <i>sq.</i> ; as shown by the automatograph .. ..	353-4
Activity, idea of, in cause .. ..	274
Acts, with and without a motive .. ..	96-7
Adamson, Profr. R., on knowledge, 104; belief .. ..	301-2
✓Affirmative evidence .. ..	333-4
After images, in hallucination .. ..	441
Agriculturists, superstition of .. ..	555-6
Alcoholism, <i>see</i> Intoxication.	
Alexander, Profr. S., on will, 386; punishment, 524, 528; responsibility, 531; lynch law .. ..	542
Alibi, ineffectiveness of, explained, 324; reason of popularity of ..	335
Alienation, land legislation, Appendix II.	
—Ameer Ali and Woodroffe, on exclusion of evidence, 3; expert evidence, 20-21, 38; the burden of proof, 42; estoppel, 42; 50, 114, 137 <i>sqq.</i> ; § 11 (2) Evidence Act, 45; extension of English law to India, 49, 559; connection of psychology with law, 58; rele- vancy, 74; § 7, Evidence Act, 76, 282; §§ 26 and 27, Evidence Act, 78, 284-5, 567; admissibility of evidence, 83; intention, 113, 137-9; negli- gence, 138-9; motive, 150-2, 272; inducement in confessions, 158; inference and recollection, 186; consistency, 191-2; accomplice-evidence, 192; inference and consciousness, 226; matter of fact and matter of opinion, 231, 235; similar facts and causation, 280; reasonable doubt, 311; oaths, 332-3; affirmative and negative evidence, 333-4; demeanour of witnesses, 349- 50; symptoms of fear, 350; presumptions of continuance, 373-4, 428; evidence of character, 375-6; insanity, 428; talking in sleep, 470; same transaction, 472-3; identification by photographs, 484; comparison of hand-writing, 492-3; conduct of crowds, 493; § 30 of the Evidence Act, 569; confessions .. ..	567-8, 569

American, Pres. Taft's indictment of courts, 82-3 ; law as to insanity, 419 ; view of the state of the law in America, <i>see</i> Appendix II.	
Amnesia .. .. .	197
Amos, Profr. Sheldon, on the technical language of law, 30, 31 ; law and morality, 32, 52-3, 54, 55, 56-7 ; equity, 45 ; trial by jury, 56 ; use of presumptions in law, 57 ; negligence, 265-6 ; intoxication and responsi- bility .. .. .	507-8
Anger, state of mind in .. .. .	101-2, 106
Animal magnetism, <i>see</i> Binet and Féré.	
Animals, conduct of, 493-4 ; love of .. .. .	561-2
Anson, Sir W., on 'same transaction' .. .. .	473
Anthropology, evidence of, about modesty .. .. .	362
Appellate Courts, their position with reference to evidence wrongly admitted, 79 ; and corroboration, 81 ; their worship of rules of procedure, 84 ; their irrational scepticism, 315-6 ; per- versity of .. .. .	317
Appetites, depend on the organism .. .. .	431-2
Archbold, on intention in drunkenness, 505 ; tests of insanity .. .. .	512
Aristotle, on prudence, 248 ; the good man, 258 ; causation .. .. .	271
Artificiality, of legal procedure, 42-3 ; of legal doctrine of intention .. .. .	107-8
Asiatic, <i>see</i> Eastern.	
Association of ideas, and inhibition, 178-9 ; explained, 183-4 ; and illusions of memory, 199-200 ; in belief, 323-4, 343 ; method of using to discover crime, 356 <i>et seq.</i> ; in insanity, 381 ; in hallucination .. .. .	442
Attempt, to commit a crime and hypnotism .. .. .	467-8
Attention, in will, 94 ; and recollection, 180, 190-1 ; psychological description of, 204 <i>et seq.</i> ; spontaneous and voluntary, 206 ; and interest, 207-8 ; determinants of, 209 ; effects of, 209-10 ; and prejudice, 210 ; the scope of, 211-2 ; and intention, 212-3 ; defective in insanity, 381 ; and fixed ideas, 423 ; and writing .. .. .	491-2
Automatic handwriting, speech, etc. .. .. .	225
Automatograph, the .. .. .	353-4
Auto-suggestion .. .. .	452, 464
Average, the man, 112 ; <i>see</i> also under normal man.	
BAGEHOT, W., on conviction, 353 ; custom .. .. .	558
Bain, Profr. A., on emotion and attention, 173-4 ; general ideas, 243 ; sus- picion, 305 ; belief, 321, 323 ; punishment, 524, 525-6, 527, 534	
Barrister, the judge, his treatment of native opinion, 258 ; his want of experience of the people .. .. .	305
Barth, Dr., on Somnambulism .. .. .	124
Belief, described, 301-2 ; and inference, 302 ; depends on experience and association, 303 ; influence of fear on, 305 ; opposed to doubt not disbelief, 308 ; and feeling, 320 ; and action, 320-1 ; and desire, 322 ; the intellectual element in, 323 ; imagination and, 324 ; truth of and its consequences, 339 <i>sqq.</i> ; true and false .. .. .	342
Bentham, J., on law and morality, 55 ; the value of the individual .. .. .	331
Bergson, H., on the nature of life and experience .. .. .	72
Berkeley, Bishop, on abstract ideas .. .. .	244

Best, W. M., on necessity of psychology in evidence, 20 ; legal doctrine of intention, 102, 109-10, 129 ; estoppel, 141 ; memory, 167, 194 ; attention, 204 ; observation and perception, 213, 225 ; physical impossibility, 226 ; proof, 302, 311 ; probability, 328 ; oaths, 333 ; proving a negative, 335 ; demeanour of witnesses, 350 ; evidence of character, 376 ; legal insanity, 424, 427 ; moral insanity, 429 ; identification by hand-writing .. .. .	486-7, 492
Bigelow, on philosophy and law .. .. .	4
Binet, A., on attention in will, 94 ; memory, 170 ; recollection and inference, 187 ; perception and reasoning, 232-3 ; visualization and hallucinations, 443 ; illusion, 449 ; resemblance and identity, 480, 482 ; thought .. .. .	488
Binet, A., and Féré, Ch., on impulse in will, 89 ; hypermnesia, 175, 221 ; hyperæsthesia, 221 ; movements in emotion, 347 ; irresistible impulses, 398-9 ; impulsive acts in madness, 413-4 ; the nature of hallucinations, 441-2, 444 ; hypnotic suggestion, 445 ; hypnotism, 450 <i>sqq.</i> ; the responsibility of the hypnotic criminal, 461-2 ; writing under hypnotism .. .. .	492
Blind, extraordinary powers of the .. .. .	222-3
Boycotting, in Ireland and the law, Appendix II.	
Bradley, F. H., on results of specialisation, 7 ; will and intention, 88 ; impulse, 88-9 ; desire, 91 ; motive, 95, 97 ; habit in volition, 99-100 ; intention, 108 ; forcing the will, 156 ; recollection and inference, 187-8 ; memory, 196 ; attention, 212 ; sense powers, 214 ; introspection, 227-8 ; the average man, 258 ; universal standards, 267-8 ; cause, 275, 279 ; occasion, 283 ; reality, 304 ; negatives, 309 ; doubt, 315-6 ; proof, 330 ; disposition and environment, 374 ; meaning of series, 476 ; identity, 476-8 ; similarity, 480, 481 ; responsibility, 502 ; will, 503 ; punishment, 521, 523 ; inherited types .. .. .	548
Büchner, on the velocity of thought .. .. .	111
Buckle, T. H., on the Scotch clergy, 6 ; picturing others' feelings, 250 ; utility of oaths, 333 ; society and the individual, 530-1 ; sympathy and punishment, 540 ; differences of race, 548 ; influence of climate, etc., on race, 553 <i>sqq.</i> ; superstition, 554-5 ; religion and education .. .. .	557
Buddhism, and love of animals, 561-2 ; teaches resignation, 563 ; morality of and Christianity the same, 564 ; doctrine of Karma .. .. .	563
Burman, marriage what constitutes, 130-1 ; secretiveness, 332 ; view of punishment, 542-3 ; temperament, 551, 552 ; independence, 553 ; imagination, 554 ; ignorance of medicine, 555 ; superstition, 555 ; want of veracity, 560 ; charity, 561 ; love of animals, 561-2 ; fearlessness of death, 562-3 ; contentment and resignation, 563-4 ; lack of combination and conscientiousness .. .. .	564-5
CARPENTER, Dr., on the nervous system .. .. .	369
Cause, and motive not the same, 151-2, 272 ; and relevancy, 75, 76, 270, 278 <i>sqq.</i> ; final and efficient confused, 272 ; popular idea of, 273 ; a subjective affair, 274-5 ; relation of, to effect, 277 ; and temporal	



and spatial relations, 276-7 ; and resemblance, 280-1 ; and occasion and opportunity, 282 ; as sum of conditions, 283 ; and effective condition, 283 ; and proximity of time, 276, 284 <i>sqq.</i> ; immediate and proximate, 288 <i>sqq.</i> ; real, decisive, 289 ; and natural and probable consequences, 287 <i>sqq.</i> ; Sir J. F. Stephen's treatment of, 293-300 ; and, 'same transaction' .. .. .	472-3, 479
Certainty, aimed at in the law, 12-13, 40, 52, 63, 64 ; the subjective feeling of, 179, 181, 229, 304 ; moral .. .. .	303
Change, in causation, 275 ; mental law of, 374 ; of character, 373-5 ; Eastern aversion to .. .. .	557-8
Character, presumption of continuance of, 373 <i>sq.</i> ; evidence of, 375 <i>sqq.</i> ; and disposition .. .. .	376 <i>sqq.</i>
Charges, effect of misjoinder of .. .. .	576
Christian, view of human life, 562 ; view of death as a punishment .. .. .	563
Christian Scientists, misunderstood in the law courts .. .. .	40
Classification of criminals .. .. .	517 <i>sqq.</i>
Cocaine, effects of .. .. .	510
Cognitive faculties, cannot be separated from emotions and will .. .. .	385 <i>sqq.</i>
Cohen, M.R., on the failure of the law to adapt itself to progress .. .. .	Appendix II.
Colonies for criminals .. .. .	517, 521
Colour, experiments in distinguishing .. .. .	218
Commissions, and demeanour of witnesses .. .. .	350
Common law, English, mischievous applications of, Appendix II	
Comparison, 485 ; of handwriting .. .. .	485 <i>sqq.</i>
Compulsion, <i>see</i> Responsibility.	
Condition, and cause .. .. .	283
Conduct, meaning of, in Evidence Act .. .. .	77, 564, 572-3
Confessions, what are voluntary, 153, 157-8 ; untrue, 335-7 ; test of true by association method, 359 ; by intoxicated persons, 461 ; under hypnotism, 460-1, 464 ; corroboration of, 569-70 ; certificate to record of .. .. .	575
Conscientiousness, Burman, want of .. .. .	564-5
Consciousness, transmission theory of, 203 ; and attention, 205, 211 ; double, 224 ; and inference, 230 ; cannot be split into three divisions .. .. .	386 <i>sqq.</i>
Consent, meaning of, 154 <i>sq.</i> ; and surprise .. .. .	362-3
Consequences, natural and probable, 103, 240 <i>sq.</i> ; 287 <i>sqq.</i> , 561 ; legal, 129 <i>sqq.</i>	
Consideration, meaning of .. .. .	145-7
Consistency, as a mark of truth .. .. .	191 <i>sq.</i> , 325
Continuity, in causation, 277 ; legal presumptions of, 373, 427-9 ; in identity .. .. .	473, 477-8, 483
Contract, freedom of, Appendix II.	
Contract (Indian) Act, use of section 74 of, 46 ; contracts contrary to public policy 46 ; consent in, 154 ; § 151 discussed, 255, 259 ; § 16 discussed, 255-6 ; § 14 discussed, 273 ; § 56 discussed, 325-6 ; § 12 discussed .. .. .	426
Convenience, the principle of, and identity .. .. .	474, 477, 479
Copy, use of, to refresh memory .. .. .	42, 194
Corroboration, nature of, 80-1 ; and repetition, 191 <i>sq.</i> ; of confessions, 569-70 ; of accomplice evidence .. .. .	574-5

	PAGE.
Counterfeit coin cases .. .. .	500
Crime, detection of, by association method, 356-9; and the feeble-minded	517 <i>sqq.</i>
Criminal Procedure Code, same transaction in, 472; preventive sections of, 529; § 533 quoted, 575; application of, § 537, unduly narrowed .. .. .	576
Crowds, conduct of .. .. .	493-7
Cunningham, H. S., on § 11 (2), Indian Evidence Act .. .. .	47
Cunningham and Shephard, on intention in estoppel, 141; consideration, 146; motive, 146; consent, 154-5; negligence, 255; coercion, 256; impossibility, 325; insanity with reference to contracts .. .. .	424
DARWIN, Ch., on instinct, 95; fear, 173; emotion, 346; habit, 372; hereditary tendencies, 516; different temperaments .. .. .	550-1
Death, exceptional powers just before, 203, 222; fear of, and superstition, 555; Burman fearlessness of, 562-3; sentence of, <i>see</i> Sentences.	
Defamation, definition of, discussed, 118; intention in Indian law of .. .. .	163-6
Defences, why some preferable, 323-4; of hypnotism .. .. .	461-2
Degeneration, 409, 432; fixed ideas a symptom of, 423; and crime .. .. .	518 <i>sq.</i>
Deliberation, described .. .. .	92
Delusions, as a mark of madness .. .. .	389, 416 <i>sqq.</i> , 421-2
Demeanour of witnesses .. .. .	349 <i>sqq.</i>
Dementia, loss of memory in senile .. .. .	198
Desire, defined, 92; the stimulus to action, 95; and belief .. .. .	322
Detection of crime, use of experimental psychology for .. .. .	356-9
Dicey, Profr. A. V., on legal fictions, 27; precedents and judge-made law, 61-2; the uncertainty of the law, 66; law and public opinion .. .. .	134
Difference, <i>see</i> Similarity.	
Disbelief, not equivalent to doubt .. .. .	308
Diseases, mental, <i>see</i> , Insanity; hereditary .. .. .	429-31
Disposition, meaning of habitual, 376; and character .. .. .	378
Double consciousness .. .. .	224
Doubt, psychological description of, 307-8; and belief and disbelief, 308; reasonable, 310 <i>sqq.</i> ; irrational .. .. .	315-6
Drunkenness, <i>see</i> Intoxication.	
EASTERN races, emotion in, 351; credulity of, 555-6; imagination in, 553-4; their aversion to change, 557-8; want of veracity in, 559-60; love of animals among .. .. .	561-2
Effects, <i>see</i> Cause.	
Emotion, lack of, in judges, 69; guides conduct, 98-9; influence of, on memory, 173-5, 195-6; revivability of, 195-6; and interest, 208; influences belief, 320, 352-3; described, 345; its motor character, 345-6; expression of, 346-7; instinct and, 347-9; disturbs the intellect, 352; measured by experimental psychology, 353 <i>sqq.</i> ; and cognitive faculties, 382 <i>sqq.</i> , 385 <i>sqq.</i> ; depends on the organism, 388; increases suggestibility .. .. .	494
English, want of imagination in, 554; and Burman temperaments, 551-2; law decisions and Eastern ideas, 559; Appendix II; love of veracity .. .. .	559-60

English law, its introduction into India, 48-9, 163 <i>sqq.</i> , 559 ; as to refreshing memory, 194 ; its failure to adapt itself to the times, Appendix II.	
Environment, and disposition, 374 ; included in the self, 267 ; and illusions ..	449
Epileptics, imprisonment of, 82 ; responsibility of, 409-10, 436 ; and moral insanity, 433 ; and crime .. .. .	436
Equity, spoil by the law .. .. .	43-5
Estoppel, law of, described, 43, 50 ; intention in .. .. .	137-142
European, veracity of, 331-2 ; and savage, 367 ; former credulity of, 555 ; influence of commerce on, 556 ; love of progress exceptional ..	558
Evidence, writers on, and psychology, 19, 20-1 ; exclusion of, 41-2 ; accomplice, 80, 574-5 ; effect of rules of, on judges, 83-4 ; of intention, 109 ; discrepancies in, 220 ; meaning of weighing, 305-6 ; on oath, 332-3 ; affirmative and negative, 333-5 ; of character, 375 <i>sqq.</i> ; expert on handwriting, meaning of, 490 <i>sq.</i> , 570-1 ; of deceased persons, 571 ; of conduct, 572 ; when extrinsic is permissible ..	572-3
Evidence Act, Indian, psychological passages in, 20 ; §§ 32 & 33 criticised, 41 ; section 11 (2) how interpreted, 46-7, 73 ; restriction of § 165, 47-8 ; restriction of § 18, 49 ; § 115 discussed, 50 ; 137 <i>sqq.</i> ; § 6 discussed, 73-4 ; § 7 discussed, 76, 282 ; § 14 quoted, 76 ; §§ 8 & 9 discussed, 77, 566 ; §§ 26 & 27 discussed, 77-8, 283 <i>sqq.</i> , 567-8 ; § 30 discussed, 78, 569 <i>sq.</i> ; § 167 referred to, 49, 79, 84 ; § 133 quoted, 80, 574 ; principle of § 157 explained, 191 ; refreshing memory in, 194-5 ; § 3 discussed, 73, 311-2 ; § 55 discussed, 375 <i>sq.</i> ; § 47 quoted 489 ; § 32 discussed, 571-2 ; § 92 discussed, 572 3 ; § 112 referred to, 574 ; effect of § 33 restricted .. .. .	576
Evil eye, <i>see</i> Witchcraft.	
Experience, nature of human, 72, 392-3 ; the source of belief, 303 <i>sqq.</i> , 323 ; and reality, 304 ; of human nature, 305-7 ; and probability, 328-330 ; imagination limited by .. .. .	366-7
Experiments, on reliability of memory, 201-2 ; on observation and perception, 216-9 ; in measuring emotions, 353 <i>sqq.</i> ; on effects of alcoholism .. .. .	510
Expert evidence, what is, 20-1 ; how treated by lawyers, 38-9 ; on handwriting .. .. .	490-2
Eye movements, use of, in detection of crime .. .. .	354
FACULTY psychology .. .. .	385-6
False recollection, causes of, 198 <i>sq.</i> ; assertion, meaning of .. .. .	325
False witness, <i>see</i> 'Witnesses' and 'Perjury,' demeanour of, 351 ; and untrue explanations .. .. .	368-9
Familiarity in memory, 182-3 ; a cause of attention .. .. .	209
Fancy and memory .. .. .	168
Fear, and memory and observation, 173-4 ; and belief, 305 ; outward expression of, 349, 350 ; influences thought .. .. .	352
Feeble minded, imprisonment of the, 82 ; described .. .. .	517 <i>sqq.</i>
Feeling, determines action, 98-9 ; in motive, 149-50 ; and memory, 174, 195-6 ; and belief, 320 ; described, 345 ; influence of on ideas, 370 ; and will .. .. .	387
<i>See also</i> 'Emotion.'	



	PAGE
Fictions, use of, in law .. .. .	26-9
Field, C. D., on the duties of Courts, 21 ; genuine witnesses ..	316
Final Cause, <i>see</i> Cause.	
Force, and will, 156 ; idea of, in cause, 273 ; and insult to modesty ..	361
Forgetfulness, <i>see</i> 'Amnesia' and 'Obliviscence.'	
Fowler, Prof. Th., on veracity .. .. .	332
Fraud, legal use of the term, 32 ; complaints of use of, by lawyers, 85-6 ; intention in .. .. .	143
French, law as to insanity .. .. .	419
GALTON, F., his researches on visualization .. .. .	170
Galvanometer, the use of .. .. .	355
General ideas, <i>see</i> Ideas ; impressions, 234-5, 378-9, 488-9 ; character, 375, <i>sq.</i> ; reputation, 375 <i>sq.</i> ; standard in identification of hand- writing .. .. .	487
German, law and morality, 54 ; law as to use of precedents, 60-1 ; law as to insanity .. .. .	419
Ghose, Dr. Rashbehary, on intention, 140 ; meaning of 'wilfully', 141 ; law of merger, 144 ; negligence .. .. .	250
Gour, Dr. H. S., on insanity in the Indian criminal law .. .. .	384
Green, T. H., on will, 88 ; political obligation .. .. .	530
Griesinger, on causes of hallucinations .. .. .	443
Gurney, E., on hallucinations .. .. .	443
HABIT, in volition, 99-100 ; in prejudice, 369, 371 ; its effect on the legal mind, 371 ; continuance of character and, 373 ; effect of .. .. .	534
Habitual criminals, treatment of .. .. .	533 <i>sq.</i>
Haeckel, Prof. E., on the present state of justice, 8-9 ; love of animals ..	562
Hallucinations, of memory and their causes, 444 ; and illusions distinguished, 438-9 ; physiology of, 440-1 ; influence of, 443 ; causes of, 443-4 ; artificially produced .. .. .	444
Handwriting, comparison of, 485 <i>sqq.</i> ; as reflex-action .. .. .	490-2
Haschish, effect of, on memory, 175 ; a cause of hallucinations, 443 ; and suggestion .. .. .	453, 510
Hemp, Indian, effects of .. .. .	510-11
Hereditary, insanity, 430-1 ; diseases, 429 ; differences of race .. .. .	547 <i>sqq.</i>
Hobhouse, L. T., on the probable, 104, 328-330 ; causal relation, 276 <i>sqq.</i> ; weighing importance, 305 ; faith and the will to believe, 340 ; identity .. .. .	483
Höfding, Prof. H., on the idea in impulse, 89 ; intention, purpose, resolve, 92-3 ; instinct, 95, 129 ; motive, 96 ; feeling and action, 98, 105 ; memory, 185, 195 ; general ideas, 244, 245 ; cause, 273, 275 ; reality, 303 ; feeling and ideas, 370 ; responsibility and repentance, 539 ; dif- ferences of race, 545 ; heredity .. .. .	548
Hollander, Dr. B., on hypnotising against the will, 455 ; value of testimony of the hypnotised, 460 ; hypnotic suggestion to crime .. .. .	466-7
Holmes, T., on imprisonment of insanes and the weakminded, 82 ; physical defects of criminals, 518 ; differences of race. .. .. .	552
Homicide, definition of culpable, 117 ; causation in .. .. .	293 <i>sqq.</i>

	PAGE.
Homicidal mania .. .. .	407-8
Houston, R. P., on allegations of fraud in law .. ..	85-6, 133
Hudson, T. J., on suggestion and false testimony, 459; suggestion to suicide, etc. .. .. .	464
Humanists, <i>see</i> Pragmatists.	
Hume, David, on expectation and cause .. .. .	276
Huxley, Prof. T. H., on the generic image .. .. .	243
Hyperæsthesia, instances of, 221-2; attitude of some persons towards	237-8
Hypnotism, neglect of lawyers to study, 57; and memory, 175; and hallucinations, 444; and suggestion, 444-5, 452-3; and hyperæsthesia, 451; method of producing, 451 <i>sq.</i> ; who are liable to, 453-4; repetition in, 454; power of resistance to, 454-6; from a distance, 456; spontaneity in, 457; value of the statements of the hypnotised, 458-9, 464; as a means of obtaining evidence, 459 <i>sqq.</i> ; danger of enquiries by, 460; as a defence, 461-2; responsibility and, 461-2; cases of crime and, 171 <i>sqq.</i> ; and sleep .. .. .	468 <i>sq.</i>
Hysteria .. .. .	409-10
IDEAS, in will, 88-9; in motive, 95; inhibition of, 178-9; association of, 183-4; auxiliary in memory, 184; general, 243 <i>sqq.</i> ; 247 <i>sq.</i> , 488; influence of, in the personality, 387; fixed .. .. .	408-9, 422-2
Identification, of persons, 176-7, 181; explanation of wrong, 447; by photographs and portraits, 484-5; by handwriting .. .. .	485 <i>sqq.</i>
Identity, test of, 74; no one test of, 474; nature of, described, 474 <i>sqq.</i> ; diversity and, 475; no such thing as general, 476; is qualitative, 477-8; in 'same transaction', 472 <i>sqq.</i> ; and similarity, 480 <i>sqq.</i> ; used in two senses .. .. .	483
Idiots, 426-7; difficult to hypnotise .. .. .	454
Illusions, of memory, 198 <i>sqq.</i> ; of introspection, 227-9; of insight, 231; emotion a source of, 352; and hallucinations, 438-9; defined, 446; subject-matter and causes of, 447 <i>sqq.</i> ; limit of .. .. .	449
Images, memory, <i>see</i> Memory; generic, 189, 488; used in general ideas, 223-4, 244-5; in hallucination .. .. .	440-2
Imagination, and memory, 168, 198-9; and belief, 324; importance of, 364-5; limited by experience, 366; and aspects of nature, 553-4; and eastern races .. .. .	555-6
Imitation, of emotion, 196; instinct of, in crowds, 493 <i>sqq.</i> ; in trade-mark cases, 497 <i>sq.</i> ; in counterfeit-coin cases .. .. .	500
Immediate, cause .. .. .	287 <i>sq.</i>
Impartiality, depends on imagination and abstraction .. .. .	370
Impossibility, physical, 226; meaning of, 325; intrinsic and relative	325-7
Impressions, general, recollections or inferences, 188; nature of, 234-5, 318, 378-9, 488-9	
Impulse, described, 88-9; idea in, 88-9; insane, 382 <i>sqq.</i> , 395 <i>sqq.</i>	432
Impulsive acts, and voluntary acts .. .. .	89-92
Individual, cannot be isolated from his surroundings, 267; <i>see</i> also 'Society.'	
Inducement, 158; and confessions made under hypnotism .. .. .	460-1
Inference, and memory, 186 <i>sqq.</i> ; and consciousness, 230; sensuous and intellectual .. .. .	231 <i>sqq.</i>
Inhibition, in memory, 177 <i>sq.</i> ; lack of, in drunkenness .. .. .	509-10

Insanity, psychological description of, 380-1 ; in Indian Penal Code, 382 <i>sqq.</i> ; and delusions, 389, 415 <i>sq.</i> , 421 ; uncontrollable impulses in, 395 <i>sqq.</i> , 409 <i>sqq.</i> , 432 ; burden of proof in cases of, 403 <i>sq.</i> ; tests of, 404, 407 <i>sqq.</i> , 412 <i>sqq.</i> , 419 ; analogy of hypnotic patients, 405-6 ; fixed ideas in, 408-9, 422-3 ; and degeneration, 409 ; and epilepsy, 409-10 ; and hysteria, 409-10 ; and mania, 410 ; motiveless acts in, 410, 414-5 ; legal opinions as to, 382 <i>sqq.</i> , 395 <i>sqq.</i> , 399 <i>sqq.</i> , 411 <i>sqq.</i> ; Macnaghten's case, 415 <i>sqq.</i> ; mono- mania, 417, 423 ; French law as to, 419 ; German law as to, 419 ; American law as to, 419 ; hypochondria and imaginary diseases, 420-1 ; melancholia, 420 ; different standards of, in law, 424-5 ; lucid intervals in, 426 ; idiocy, 426-7 ; presumption of continu- ance of, 427-9 ; moral insanity, 429, 433-4 ; and hereditary diseases, 429 ; kleptomania, 430, 516 ; and intoxication, 511-2 ; and responsibility, 504 <i>sqq.</i> ; and feeble mindedness 517 <i>sqq.</i>	
Insight, described, 230 ; illusions of .. .. .	231
Instinct, described, 95, 129, 348-9 ; and emotion, 348-9 ; as a protection against hypnotism, 464 ; and imitation .. .. .	495
Insult, <i>see</i> Modesty.	
Intellect, in will, 98-9 ; its want of power, 128 ; and emotion, 352, 393-4 ; derangement of, due to emotional affection .. .. .	389 <i>sqq.</i>
Intention, distinguished from will, 88, 119 <i>sqq.</i> ; and expression of the self, 93 ; equals knowledge doctrine, 102 <i>sqq.</i> , 126 <i>sq.</i> ; what it includes, 108 ; special required by law in certain cases, 109-10 ; in kidnapp- ing cases, 129 <i>sqq.</i> ; importation of, into cases where none really exists, 132-6 ; in estoppel, 137, <i>sqq.</i> ; absent in negligence, 138 ; presumable and actual, 139-40 ; in fraud, 143 ; in cases of merger, 144 ; and motive, 147 <i>sqq.</i> ; in law of libel and defamation, 158 <i>sqq.</i> ; and attention, 212-3 ; and hypnotism, 468 ; in intoxication .. .. .	102-3, 505-8
Interconnection, of psychical states .. .. .	386 <i>sqq.</i>
Interest, in memory, 169, 172 ; and attention, 207 ; and emotion, 208 ; practical and identity .. .. .	477
Intoxication, intention in, 102-3, 118, 505 <i>sqq.</i> ; and memory, 197, 510 ; confessions in, 461 ; legal view of, 504 <i>sqq.</i> ; responsibility in, 504 <i>sqq.</i> ; psychological description of, 509-10 ; considered as a form of insanity .. .. .	511-2
Introspection, difficulties of, 227 <i>sq.</i> ; value of .. .. .	230
Intuition, and introspection, 230-1 ; and reasoning .. .. .	251-3
Irishman and Burman compared .. .. .	554
JAMES, Prof. W., on failure of legal institutions, 9 ; value of formulæ, 23 ; attention and will, 94 ; instinct, 95, 98 ; motiveless acts, 152 ; consent, 154 ; memory, 168, 175-6, 193-4, 195 ; emotion and ideas, 174-5 ; imitation of emotions, 196 ; fallibility of testimony, 200 ; attention, 205 ; hyperæsthesia, 222 ; double consciousness, 228 ; inference, 231-2 ; general impressions, 234, 318, 378-9, 488-9 ; general ideas, 244 ; doubt and belief, 308-9 ; reviving feelings, 316-7 ; feeling and belief, 320 ; secretiveness, 332 ; faith and action, 342 ; nature of emotion, 347 ; emotion	



	PAGE.
and belief, 352; modesty, 360 <i>sqq.</i> ; delusions, 421; hallucinations, 438-9; illusions, 446-7; suggestion, 452, 453-4; identity and similarity, 480-1; difficulty of understanding others, 545; differences of temperament, 551; Buddhism and Christianity .. .. .	564
Jesuit doctrine, the end justifies the means .. .. .	107
Jevons, Prof. W. S., on universal principles in law .. .. .	51-2
Joseph, H. W. B., on truth and practical consequences .. .. .	342
Jowett, Prof. B., on the uselessness of philosophy .. .. .	5
Judges, unduly tied down by rules, 40, 65; their aversion to novelty, 60, 61; choice of, 69, 70; and imagination, 366; should study insanity .. .. .	435-7
Juries, reason of popularity of, 56; how they reach their decisions, 319; expert and ordinary, 337-8; suggestibility of, 459; and standard of the average man, 242, 247, 249-50; unsuitable to the east, Appendix II.	
Jurisdiction, effect of want of .. .. .	576
Justice, as the aim of law, 2, 54, 69-70; and punishment, 521 <i>sqq.</i> ; and the preventive sections of the Criminal Procedure Code, 529 <i>sq.</i> ; and the interests of society, 536 <i>sq.</i> ; and resentment, 522-3; and the sentiment of the people, 541 <i>sq.</i> ; the same system of not suitable to all races .. .. .	551
KANT, I., on punishment .. .. .	521-2
Karma, Buddhist doctrine of .. .. .	563
Keller, Helen, blind and deaf .. .. .	223, 549
Kidnapping, intention in .. .. .	129 <i>sqq.</i>
Kleptomania .. .. .	430, 516
Knowledge, often opposed to desire, 96; does not determine conduct, 98-9, 128; equals intention theory, 102 <i>sqq.</i> , 126 <i>sqq.</i> ; explicit and implicit, 106; presumption of, 114, 117-8; in negligence cases, 241 <i>sqq.</i> ; and belief, 301; and impossibility, 325; in intoxication, 504 <i>sqq.</i> ; in legal responsibility .. .. .	512, 514
LABOUR, freedom of, Appendix II.	
Law, need of reform in, 5-6, 67-8; relation of metaphysics to, 10-1; relation of, to psychology, 13, 16-7, 35-6; specific defects of, 25 <i>sqq.</i> ; use of fictions in, 26 <i>sqq.</i> ; its assignment of arbitrary meanings to every day terms, 29 <i>sqq.</i> ; its technical language, 30-1, 36; its relation to morality, 32-3, 52-4; its refusal to avail itself of outside sources of knowledge, 37 <i>sqq.</i> , 54, 57-60; its narrow and restrictive methods, 37 <i>sqq.</i> ; Appendix I; use of presumptions in, 50-1, 57; uncertainty of, 65-6; and justice, 69-70; its wrong view of human life, 71-2; evidence of its ill-success, 8-9, 81-6; delays of, 81-4; and current opinion, 133-4; failure of, to adapt itself to changed situations, Appendix II.	
Lawson, J. D., on presumptions, 50; special intention, 109; handwriting .. .. .	490
Lawyers, their aversion to novelty and fear of philosophy, 1-2, 60; their hostility to philosophy, 4-5, 18; two classes of, 2; over specialisation of, 7; artificiality of their results, 12, 16, 136; their pretensions to deal with real life, 13-4, 108; their neglect of psychology, 17-8, 21-2, 39, 58-60; their relation to the community, 36, 62-3; their attitude to expert evidence, 38-9, 57-9;	

their excessive regard for precedents, 60 <i>sqq.</i> , 371 ; unlikely to reform the law, 67-8, 86 ; their wrong view of intention, 103 <i>sqq.</i> , 135-6 ; their deception of the community, 132-3 ; should study insanity, 435-7 ; their opposition to progress, Appendix II.	
Layman, the, his dissatisfaction with the law, 8-9, 28, 34, 36, 55-6, 65, 67, 82-6 ; Appendix II ; not expected by lawyers to understand the law, 30 ; his want of knowledge of the law, 67 ; his view of uncontrollable impulses, 402 ; his view of responsibility, 502 ; his view of intoxication, 504 ; his view of punishment, (521, 529-30, 541	
Lecky, E. H., on imagination, 365 ; veracity, 559-60 ; forethought, 561 ; love of animals, 562 ; fearlessness of death . . . . .	563
Legal, consequences presumption as to, 129 <i>sq.</i> ; education, 9 ; sense of terms, 29 <i>sqq.</i> ; maxim no man shall judge his own case, 370 ; mind and habit, 371 ; view of insanity, 382 <i>sqq.</i> , 395 <i>sqq.</i> , 399 <i>sq.</i> , 411 <i>sqq.</i> , 415 <i>sqq.</i> , 424-5 ; view of intoxication, 504 <i>sqq.</i> ; view of punishment. . . . .	527 <i>sqq.</i>
Levy, W. H., on the powers of the blind . . . . .	223
Libel, English law of discussed . . . . .	158 <i>sqq.</i>
Life, the nature of human . . . . .	71-2
Logic, lawyers aim at rather than truth, 6 ; various kinds of . . . . .	40
Lotze, on identity . . . . .	475
Lynch law . . . . .	493, 542
MACNAGHTEN case . . . . .	415 <i>sqq.</i>
Madness, <i>see</i> Insanity.	
Magnetic rapport, in hypnotism . . . . .	222
Maine, Sir H. S., on legal fictions, 26 ; eastern dislike to change . . . . .	558-9
Malice, meaning of, in law, 33 ; in law of libel . . . . .	159-160 <i>sqq.</i>
Mantegazza, Prof. P., on imitation and gesture . . . . .	495
Markby, Sir W., on legal fictions, 27-8 ; legal language, 31-2 ; equity, 44, 50 ; a moral standard in law, 53 ; authority and principles, 60 ; uncertainty of the law, 66 ; criticism of the layman, 66 ; intention, 103, 112, 135 <i>sq.</i> ; fraud, 143-4 ; consideration, 145 ; malice, 61, 162 ; negligence, 262 <i>sqq.</i> ; insanity in law, 416 <i>sq.</i> ; intention in intoxication . . . . .	506-7
Marks, as aids to memory . . . . .	183-4
Marriage, Burmese law as to, 130-1 ; form of capture in . . . . .	361
Marshall, H. R., on anger, 102 ; general ideas, 245 ; belief, 310 ; punishment, 537-9 ; inheritance . . . . .	549
Masses, <i>see</i> Crowds.	
Maudsley, Dr. H., on the treatment of expert evidence, 38-9 ; senile dementia, 198 ; the legal criterion of insanity, 397, 417, 425 ; insane impulses, 397-8 ; criteria of insanity, 407-8 ; delusions, 417-8, 422 ; moral insanity, 433 ; epilepsy and crime, 436 ; somnambulism . . . . .	469
Mayne, J. D., on authorities in law, 37 ; knowledge and intention, 102-3, 116 ; necessary and probable results, 102-3 ; intention in intoxication, 102-3 ; motive, 148 ; defamation, 163-4, 165 6 ;	

	PAGE.
discrepancies in evidence, 220; proof, 311-2; evidence of character, 377-8; uncontrollable impulses, 395, 399 <i>sqq.</i> , 411-2; trade-mark cases .. .. .	498
McDougall, Dr. W., on psychology and the social sciences, 16-7; anger, 101; telepathy, 224, 456; sub-consciousness, 225; instinct and emotions, 348-9; shame, 362; imitation, 495-6; punishment, 522; justice, 528; transmission of acquired characters, 550; the impulse of rivalry .. .. .	564
McLennan, J. F., on primitive marriage .. .. .	361
Meaning, on what it depends, 33; of life .. .. .	72
Medicine, and law, 38, 57; medical view of insane impulses .. .. .	396-8
Memory, forcing the, 143; and retentiveness and recognition, 167-8; conditions of, 169; varieties of, 169-172; of uneducated persons, 172; mechanical and intelligent, 172-3; effect of emotion on, 173-4; exceptional in some pathological states, 175; revival of, 176-8; power of imaging in, 181; exciting cause required for, 181-2; familiarity an aid to, 182-3; marks an aid to, 183-4; and inference, 186-9; aids to, 189; order of recall in, 190-1; refreshing, 194-5; amnesia, 197-8; illusions of, 198 <i>sqq.</i> ; experiments on reliability of, 201-2; and transmission theory of consciousness, 203; of idiots, 427; in intoxication .. .. .	197, 510
Mercier, Dr. C. A., on insanity in will cases, 424; lunacy commissions, 425; intoxication a form of insanity .. .. .	511-2
Merger, intention in cases of .. .. .	144
Metaphysics, relation of, to law .. .. .	10-1
Metchnikoff, Prof. E., on sensibility of the blind, 222-3; judging others by analogy, 251; perversion of instinct, 464; somnambulism, 470; conduct of crowds .. .. .	494
Mill, James, on belief and indissoluble association .. .. .	323
Mill, J. S., on retributive justice and sympathy, 522-3; justice and vengeance, 540; differences of race .. .. .	548
Miracles, Prof., Tyndall on .. .. .	306
Misjoinder, of charges .. .. .	79, 576
Misrepresentation, what constitutes .. .. .	143
Modesty, discussed .. .. .	360-2
Moll, Dr. A., on suggestion and false testimony, 459; the hypnotic condition, 460; cases of crime and hypnotism, 463; method of overcoming suggestions .. .. .	467
Monomania, medical view of .. .. .	417, 423
Moral responsibility, <i>see</i> Responsibility; insanity, 429, 433; and the physical, 431-2	
Morality, and law .. .. .	32-3, 52-4
Morphia, effects of .. .. .	510
Morselli, Prof. H., on suicide .. .. .	531
Motive, psychological meaning of, 95-6; and consideration, 145 <i>sq.</i> ; and intention, 147 <i>sqq.</i> ; and cause, 151 <i>sqq.</i> ; want of, in insanity, 410, 414, 430; motiveless acts .. .. .	96-7
Müller, on the form of capture in marriage .. .. .	361
Münsterberg, Prof. H., on neglect of psychology by lawyers, 39, 59; memory of witnesses, 170-1; inhibition in memory, 178-9;	



certainty and recollection, 179-180 ; his experiments on reliability of memory, 201-2 ; his experiments in observation and perception, 216-9 ; on sub-consciousness, 224 ; utility of oaths, 333 ; untrue confessions, 336 ; his experiments in measuring emotions, 353 <i>sqq.</i> ; on normal passion, 412-3 ; hypnotism, 451, 455 ; the suggestibility of witnesses and jurymen, 459-466 ; suggestion and suicide, crime, etc., 464, 465 ; sleep, 469 ; emotion and suggestion, 494 ; imitation in trade-mark cases, 497-9 ; intoxication, 509-10 ; inferior minds and crime, 519-20 ; punishment, 526 ; criminals ..	531
Murder, mitigation of sentences for, 115 ; intention in, 126 <i>sqq.</i> ; <i>see</i> also under homicide.	
Myers, C. S., on variation of sense powers in different races ..	215
Myers, F. W. H., his investigation of hyperæsthesia ..	222
NATIVES, veracity of, 331 ; secretiveness of ..	332
Natural, <i>see</i> Probable ; rights of the subject Appendix II.	
Nature, laws of, 226 ; and causality, 272-3, 280 ; human and experience, 305 <i>sqq.</i> ; meaning of 327 ; and imagination ..	553-4
Necessary, connection of cause and effect ..	276
Negative, has a positive basis, 309 ; evidence, 334 ; possibility of proving a ..	334-5
Negligence, in estoppel, 138-9 ; defined in law, 240 <i>sqq.</i> ; no absolute, 250 ; unsatisfactory treatment of, in law ..	262 <i>sqq.</i>
Negroes, characteristics of ..	552
Normal man, doctrine of, <i>see</i> Chapter VII ; titles of, 239 ; reason of adoption of doctrine, 241-2 ; a general idea, 243 <i>sqq.</i> ; not in fact applied as a standard, 247 <i>sq.</i> ; non-existence of, 250 ; attempts to extend doctrine of, 255-6 ; must necessarily vary, 257 ; application of doctrine causes injustice, 260-1 ; errors of doctrine ..	267-8
Novelty, a source of attention, 209 ; a source of exaggeration ..	448
OATHS, and certainty of recollection, 180-1 ; utility of ..	332-3
Obersteiner, on attention ..	208
Obliviscence, and memory, 176 ; change of memory and, 196 ; and transmission theory of consciousness ..	203
Observation, confused with inference, 200 ; errors of, 202 ; experiments in, 215 <i>sqq.</i> ; and prejudice ..	367 <i>sqq.</i>
Obstacles, sense of ..	223
Occasion, <i>see</i> Cause.	
Opinion, statement of, in law, 233, 234 ; and fact distinguished, 231, 234-6 ; presumption of continuance of ..	373-4
Opium, effect of, on memory, 175 ; form of madness produced by, 420 ; a cause of hallucinations, 443 ; and suggestion ..	453, 510
Opportunity, <i>see</i> Cause.	
Opposite, inconceivability of the ..	313
Ordinary, <i>see</i> Normal, average.	
Organism, the, emotions have their root in, 388 ; the basis of the self ..	387
Overstreet, Prof. H. A., on the failure of law to adapt itself to progress, Appendix II.	

	PAGE.
PARANOIA, due to affective conditions, 390 ; delusions in, 422 ; its connection with crime .. .. .	436
Particular ideas, and general, 243 <i>sqq.</i> ; acts and character ..	375 <i>sq.</i>
Pathological cases, exceptional memory in, 175 ; unusual sense powers in, 221 ; delusions in, 389-90 ; not understood in law ..	418-9, 435-6
Paulsen, Prof. F., on oaths .. .. .	333
Pearson, Prof. K., on the idea of force in cause .. .. .	276
Penal Code, Indian, and legal doctrine of intention, 102 <i>sqq.</i> ; 116 <i>sqq.</i> ; intoxication in, 102-3, 118 ; § 300 discussed, 112-7 ; § 113 discussed, 116 ; § 86 discussed, 102-3, 118, 504 <i>sqq.</i> ; §§ 363 and 366 discussed, 129 <i>sqq.</i> ; consent in, 154 ; law of defamation in, discussed, 163 <i>sqq.</i> ; § 354 discussed, 360-1 ; insanity in, 382 <i>sqq.</i> ; § 149 discussed ..	496
Perception, hallucination a disease of, 438, 442 ; and illusions ..	446
Perjury, and speaking on oath, 180-1 ; in two contradictory depositions ..	196
Personality, <i>see</i> self ; double .. .. .	197
Persons, recognition of .. .. .	176-7, 181
Petitio principii, legal doctrine of intention a .. .. .	109-10, 158-9
Philosophy, hostility of lawyers to .. .. .	4-5
Phipson, S. L., on presumption of continuance .. .. .	373
Photograph, <i>see</i> Identification.	
Physical, and moral connected, 431-2 ; agencies and Eastern ignorance ..	555-6
Picketing, peaceful and the law, Appendix II.	
Pittakus, law of .. .. .	511
Plato, on punishment .. .. .	523
Pleasure and pain, not causes of attention, 208 ; depend on the organism ..	431
Plethysmograph, the use of .. .. .	355
Pneumograph, the use of .. .. .	354
Political economy, compared with law .. .. .	11-2, 269
Pollock, Sir F., on law and philosophy, 4-5 ; technical language of law, 30-1 ; legal sense of terms, 33, 142, 273 ; equity, 45 ; law merchant, 45 ; extensions of English law to India, 49 ; use of precedents, 63-4 ; natural and probable consequences, 103, 240 <i>sqq.</i> ; 287 <i>sqq.</i> ; intention, 107, 140 ; reasonable cause of suspicion, 113 ; consideration, 146 ; motive, 147-8 ; consent, 155 ; malice, 162 ; the normal man, 240 <i>sqq.</i> , 258 <i>sqq.</i> ; proximate cause, 287 ; impossible agreements, 326-7 ; surprise .. .. .	362-3
Pragmatists, views of the .. .. .	14-5, 393
Precedents, and equity, 44-5 ; excessive regard in law for, 60 <i>sqq.</i> ; in Roman, German and Austrian law .. .. .	60-1
Prejudice, and attention, 210 ; and observation, 367-8 ; and thought, 369 ; and habit .. .. .	368, 371
Presumptions, use of, in law, 50-1, 57 ; that things remain the same, 373 ; of continuance of character and opinions, 373 <i>sqq.</i> ; of continuance of insanity .. .. .	427-9
Preventive Sections, <i>see</i> Criminal Procedure Code.	
Probable, doctrine of consequences .. .. .	103, 240 <i>sqq.</i> , 287 <i>sqq.</i>
Probability, as test of relevancy, 73-4 ; nature of .. .. .	104, 328-33

	PAGE.
Proof, burden of, 42 ; meaning of, in law, 302 ; and demonstration, 330 ; of negatives .. .. .	334-5
Prudent man, <i>see</i> Reasonable man ; nature of prudence .. .. .	248-9
Psychical Research Society, proceedings quoted .. .. .	222, 224, 237
Psychology, Sir F. Pollock on its relation to law, 5 ; when legal presumptions must yield to, 13 ; the foundation of the Social Sciences, 16-18 ; its data, 18 ; its relation to common sense, 18-19 ; neglect of, by lawyers, 21-2, 39, 58 ; experimental how utilised for law .. .. .	201-2, 215 <i>sqq.</i> , 353 <i>sqq.</i> , 510
Punishment, objects of, 521 <i>sqq.</i> ; retributive, 521 <i>sqq.</i> ; reformatory, 523-4 ; deterrent, 524 <i>sqq.</i> ; basis of legal, 527 <i>sqq.</i> ; excessive in certain cases, 532-3 ; of habitual criminals, 534 <i>sqq.</i> ; utilitarian view of condemned, 537 <i>sq.</i> ; founded on responsibility and justice, 539-40 ; and sentiment of the people .. .. .	541-3
RACE, differences of, in sense powers, 215 ; in expression of the emotions, 347-8 ; difficulty of understanding persons of another, 545-6 ; differences of and heredity, 547 <i>sqq.</i> ; and temperament, 550-1 ; and food and climate, 553-4 ; and superstition .. .. .	554-6
Rape cases, consent in, 157 ; immediate complaint in .. .. .	321
Rapport, magnetic in hypnotism .. .. .	222
Re-actions, measured by experimental psychology .. .. .	353 <i>sqq.</i>
Reality, Bergson's view of, 72 ; criterion of .. .. .	303-4, 325
Reason does not determine action, 98-9 ; and motive, 148-50 ; nature of .. .. .	248
Reasonable man, doctrine of, <i>see</i> Chapter VII ; 239 <i>sqq.</i> ; doubt .. .. .	310 <i>sqq.</i> , 330
Reasoning, and use of middle term .. .. .	251-3
Recognition, and memory, 167-8 ; of persons, 176-7 ; feeling of, 183 ; in trade-mark cases, etc. .. .. .	499
Recollection, <i>see</i> Memory.	
Reflex-action, writing a .. .. .	490-2
Relevancy, nature of, 73 ; and causation .. .. .	270, 278-9
Religion, and oaths, 331-2 ; and superstition, 555, 557 ; and education .. .. .	557
Remoteness, of consequences .. .. .	287 <i>sqq.</i>
Repetition, and corroboration .. .. .	191 <i>sq.</i>
Reputation, and character not the same .. .. .	375 <i>sq.</i>
Resemblance, <i>see</i> Similarity.	
Resolve, defined .. .. .	92-3
Responsibility, and self conscious volition, 99-100 ; moral, 100-1, 502 ; its basis voluntary action, 381 ; in mental disease, 382 <i>sqq.</i> ; 512 <i>sqq.</i> ; legal and moral, 501 ; and compulsion, 502-3 ; degrees of, 503-4 ; knowledge necessary for, 502, 504 ; in intoxication, 504 <i>sqq.</i> ; of the feeble-minded .. .. .	517 <i>sqq.</i>
Results, methods of judging acts by, 107 ; general impression a result .. .. .	234
Retentiveness .. .. .	168
Ribot, Th., on volition and choice, 93 ; desire, 98 ; the emotional state, 106 ; the intellect, 128 ; memory, 175, 176, 178 ; attention, 205-6, 208-10 ; general ideas, 223-4 ; introspection, 227 ; the motor character of emotion, 346 ; surprise, 363-4 ; the organism, 387, 388 ; influence of ideas, 387 ; irresistible impulses, 398, 410-1, 432 ; criteria of insanity, 408 ; fixed ideas, 408, 423 ;	



	PAGE.
anger, 106, 411-2; insanity due to lack of impulse, 420; the self, 426; hallucinations, 441-2; reflex-action ..	491
Ricardo, his view of political economy .. ..	11
Rights, theory of natural, Appendix II.	
Robertson, Prof. E., on relevancy and causal connection, 270-1; belief and inference .. ..	302
Rogers, H. W., on handwriting .. ..	490
Roscoe, on identification by photographs .. ..	484
SAILORS, why superstitious .. ..	556
Same, ambiguous use of the word .. ..	483
See also Identity.	
Savages, their powers of memory, 172; the minds of ..	367, 546
Scepticism, condemned, 237-8; and the Barrister Judge, 305; and basis of positive knowledge .. ..	315
Schiller, Dr. F. C. S., on reality, 14-5; memory, 203; contradictory beliefs, 310; test of truth, 325; intellection, 393; Buddhist doctrine of Karma .. ..	563
Scotchmen, want of imagination of .. ..	554
Secretiveness, of native witnesses .. ..	332
Sedition, 83; Appendix II.	
Seduction .. ..	129-30
Select Committees, speeches of, not an authority in law ..	37
Self, the meaning of, 93; in motive, 96; in character, 375; its contents	386-7, 426
Sensation, in hallucination .. ..	440 sq.
Senses, the value of evidence of, 214; variation in powers of, 215 sq.; illusions of .. ..	446, 448
Sentences, severity of, in certain cases, 532-3; effect of long ..	534-5
Series, meaning of .. ..	476
Shyness, the root of modesty .. ..	360
Similarity, and relevancy, 76; and causation, 280-1; and identity	480 sq.
Sleep, state of mind in, 469; utterances in, not evidence ..	470
Smith, Adam, his treatment of political economy, 11; on imagining the feelings of others, 250-1; sympathy and the penal law ..	540
Snell, E. H. T., on intention in fraud, 143; meaning of same transaction	473, 478
Society, interests of and moral insanes, 536; interests of and justice, 536 sq.; obligations of and the individual .. ..	530-1
Socratic view that vice is ignorance .. ..	543
Somnambulism, and will, 121, 124-5; recollection in, 175; sense powers in, 221; described .. ..	469-70
Sound, experiments in identification of .. ..	217, 219
Space, and the causal relation, 276-7; and identity .. ..	472-3, 477-8
Spectator, the, on unintelligibility of law .. ..	81
Spencer, Herbert, on emotion and conduct, 99; the inconceivability of the opposite, 313; punishment and crime ..	524-5
Sphygmograph, the use of .. ..	355
Spinoza, on appetite .. ..	98
Stephen, Sir J. F., on the use of legal and moral terms, 32-3; § 11 (2), Indian Evidence Act, 47; § 165, Evidence Act, 48; English law of evidence, 48-9; relevancy, 74, 278; effect of wrong admission and rejection of evidence, 84; will	

and intention, 119 <i>sqq.</i> ; motive and intention, 148; malice, 148, 160, 162; intention, 164; causation in homicide, 293 <i>sqq.</i> ; experience of human nature, 306-7; reasonable doubt, 314, 339-40; general impressions, 319; truth, 337-8; belief, 339; evidence of character, 376; insanity in law, 395; meaning of same transaction, 474; intention in intoxication, 505; legal punishment, 527-8; administration of criminal justice	.. 541
Störing, Prof. G., on affective anomalies and madness, 390-1, 412; delusions in paranoia, 422; idiocy, 427; moral insanity, 434; influence of hallucinations, 443; intoxication	.. 510
Stout, Prof. G. F., on conservatism of primitive societies, 7; psychology, 18; the self, 93; voluntary action, 93-4, 152, 158; the self and motive, 96; anger, 101; meaning of motive, 148; memory, 172, 186, 189; coalescence, 200; attention, 208, 211; inference, 232; general ideas, 243, 244; causality, 274; similarity, 281; doubt, 307, 313; belief and desire, 322; association of ideas and belief, 323-4; surprise, 364; imagination, 366-7; habit, 371-2; faculties as causes, 385; interconnection of psychical states, 386; delusions, 389; irresistible impulses, 399; Idiocy, 427; thinghood, 477; uncertainty of revival, 484-5; comparison, 485, 487; automatic actions, 491; minds of savages	.. .. 546
Strikes, failure of law in matter of, Appendix II.	
Sub-consciousness, 224; and first thoughts	.. .. 352
Suggestion, effects of, illustrated, 219, 444-5; hypnotic, 444-5, 452-4 <i>sqq.</i> ; to suicide, 464; study of, by advocates, 468; and conduct of crowds, 493 <i>sqq.</i> ; and intoxication	.. .. 509-10
Suicide, hypnotic suggestion to, 464; causes of	.. .. 531
Sully, Prof. J., on psychology and common sense, 19; desire and motive, 95-6; the intellectual factor, 99; habit in volition, 100; anger, 101-2; recollection, 169, 170; feeling and memory, 174; obliviscence, 176; memory, 172, 181, 182, 185, 186, 189-90, 191; illusions of memory, 198-200; attention, 209; introspection, 228, 230; inference and insight, 230-1; reasoning and intuition, 233; general ideas, 244-5, 247; judging others, 251; reasoning, 252-3; causal agency, 273; cause and condition, 283; belief, 303, 320; expression of the emotions, 346, 348-9; emotion and intellect, 352; surprise, 364; imagination, 366; observation, 368; insanity, 380-1, 392; hallucinations and illusions, 439; illusions, 446 <i>sqq.</i> ; identity, 475; comparison, 489-90; limits of volitional control, 515; effect of habit, 534; justice, 540; differences of race, 545; transmission of acquired characters	.. .. 547-8
Superstition, in narratives, 369; effects of	.. .. 554-6
Surprise, psychological description of, 363-4; as ground for setting aside contracts	.. .. 363-4
Suspicion, described	.. .. 305, 390-1

	PAGE.
Sympathy, and justice, 522-3, 540 ; and the penal laws ..	540
Taft, President, his indictment of law in America ..	82-3
Taine, H., on abstract ideas, 248 ; images and belief ..	442
Taylor Pitt, on exciting recollection, 194 ; evidence of opinion, 233 ; pre- sumption of continuance ..	373
Telepathy, 224 ; and hypnotism ..	456
Tenancy legislation, Appendix II.	
Thayer, Prof. J. B., on the Indian Evidence Act ..	75
Theft, and receiving stolen property, 479 ; excessive punishment in some cases of ..	532-4
Thought, velocity of, 111 ; transference, 224 ; and prejudice ..	369
Time, experiments in estimation of, 216-7 ; and space in causation, 276, 473 ; in identity ..	472-3 ; 477-8
Titchener, Prof. E. B., on attention and prejudice, 210 ; introspection ..	230
Torture, use of, to obtain evidence ..	355
Trade mark cases, imitation in ..	497-9
Trades Unions, action of and the law, Appendix II.	
Truth, should be grasped as a whole, 71-2 ; and consistency, 191-2 ; ring of, 316 ; test of, 325 ; discovery of, by experimental psychology 353 <i>sqq.</i>	
Tyndall, Prof. J., on belief and experience ..	306
UNCONDITIONALITY, idea of, in cause ..	276
Unconscious, reasoning ..	252
Underhill, G. E., on final and efficient cause, 271-2 ; causality in the mechan- ical world, 280 ; test of truth ..	325
Uniformity, in the law, 40, 65 ; causal, 272 ; of expression of the emotions ..	347-9
Universal, normal man as a standard, 242-3 ; ideas, 243 <i>sqq.</i> ; meaning of a universal standard ..	267-8
Utilitarian, wrong view about the individual, 267 ; dictum that every man is to count for one ..	331
VARIETIES, of memory, 169-171 ; of sense powers ..	215 <i>sqq.</i>
Veracity, of European and Native, 331-2 ; an industrial virtue ..	559-60
Vision, experiments in ..	216, 218
Visualization ..	170
Volition, <i>see</i> Will.	
Voluntary, and impulsive acts distinguished, 89-92 ; confessions ..	153 <i>sqq.</i> , 157
WAITZ, TH., on modesty ..	360
Ward, Dr. J., on physics and economics, 11-2 ; desire, 96 ; memory, 167, 170 ; order of recall in memory, 190-1 ; attention, 210 ; laws of nature, 226 ; general ideas, 246 ; the real, 268, 304 ; causal uniformity, 272-3 ; causation, 274-5 ; subjective certainty, 304 ; meaning of nature, 327 ; expression of the emotions, 351 ; nature of experience, 392-3 ; hallucinations, 440 ; identity ..	483
Weakminded, the, imprisonment of ..	82
Weismann, Prof. A., on the transmission of acquired characters ..	549
Whitworth, G. C., on relevancy and cause ..	75
Wilfully, meaning of ..	141-2
Will, defined, 87 <i>sqq.</i> ; and attention, 94 ; and desire, 92 ; the intellectual factor in, 99 ; self-consciousness in, 99-100 ; and intention, 119 <i>sqq.</i> ;	



in voluntary confessions, 153; in consent, 154; meaning of forcing the will, 156; and cognitive faculties, 382 <i>sqq.</i> ; no will in general, 386; and responsibility .. .. .	502-3
Wilson, Dr. Albert, on the attitude of lawyers to medical evidence, 39; neglect of psychology by lawyers, 58; precedents in law, 85; paranoia and crime, 436; alcoholism, 509; kleptomania, 517; the feeble-minded, 518-9; punishment, 524; effects of long incarceration, 534-5; acquired characters, 549; differences of race .. .. .	552
Witchcraft, trials, 337; tales of based on fact .. .. .	369
Witnesses, various kinds of recollection of, 170-1; capricious memory of, 185; talking over events together, 189-90; should narrate events chronologically, 190; and foreign languages, 197; errors in recollections of .. .. .	201-3
Woman, modesty of .. .. .	360-1
Writing, how far reflex action .. .. .	490-2
Wrongful, legal use of term .. .. .	110, 158-9
Wundt, Prof. W., on the relation of psychology to the mental sciences, 18; impulsive and voluntary acts, 89 <i>sqq.</i> ; motive, 95, 96; feeling and will, 99; will in new-born children, 123; somnambulism, 124; internal volitional acts, 126; instinct, 129; memory images, 168; association of ideas, 183-4; attention, 205, 211; general ideas, 245; relativity, 267; doubt, 308; expression of the emotions, 351; insanity, 381; will, 386, 387; interconnection of psychical states, 391; illusion 448; compensation of functions, 450-1; identity and likeness, 482; inheritance of acquired characters .. .. .	547













C029509372

LAW PUBLICATIONS BY THACKER, SPINK &amp; CO., CALCUTTA. 4

**RIVAZ.—The Indian Limitation Act (Act IX of 1908)**

With Notes. By the late Hon'ble H. T. RIVAZ, Bar.-at-Law, Judge of the Chief Court of the Punjab. Sixth Edition. By H. G. PEARSON, Bar.-at-Law, and Advocate of the High Court at Calcutta; and B. K. ACHARYYA, B.A., LL.B., Bar.-at-Law, and Advocate of the High Court, Calcutta, and Tagore Law Lecturer for 1912. Royal 8vo, cloth. Rs. 12. [1912.]

**SARKAR.—The Mimansa Rules of Interpretation (Hindu**

Law)—Tagore Law Lectures, 1905. By K. L. SARKAR, M.A., B.L. Royal 8vo, cloth. Rs. 10.

**SHEPHARD AND BROWN.—Commentaries on the Trans-**

fer of Property Act. By HORATIO HALE SHEPHARD, M.A., Bar.-at-Law, late Judge of the High Court, Madras; and KENWORTHY BROWN, M.A., Bar.-at-Law. Seventh Edition. Royal 8vo. Rs. 18. [1910.]

**SWINHOE.—The Case-Noted Penal Code.** By CHARLTON

SWINHOE, Bar.-at-Law. Giving under each Section the references to the cases decided under it. With, in many cases, a résumé of the arguments and decisions. Second Edition. Crown 8vo. Rs. 7. [1909.]

**SWINHOE.—The Case-Noted Criminal Procedure Code**

(Act V of 1908). With a list of judgments collected under each section and with cross references where reported under more than one section. By DAWES SWINHOE, Bar.-at-Law, and Advocate of the High Court at Calcutta. Crown 8vo, cloth. Rs. 7. [1901.]

**TREVELYAN.—Hindu Law as Administered in British**

India. By Sir ERNEST JOHN TREVELYAN, D.C.L., Bar.-at-Law, late a Judge of the High Court at Calcutta. Royal 8vo, cloth. Rs. 20. [1912.]

**TREVELYAN.—Hindu Family Law as administered in**

British India. By Sir ERNEST JOHN TREVELYAN, D.C.L., Bar.-at-Law, late a Judge of the High Court at Calcutta. Demy 8vo, cloth. Rs. 12. [1908.]

**TREVELYAN.—The Law Relating to Minors as adminis-**

tered in the Provinces subject to the High Courts of British India, together with the Practice of the Courts of Wards in Bengal, Madras, and the North-Western Provinces. Third Edition. By Sir ERNEST JOHN TREVELYAN, D.C.L., Barrister-at-Law, late a Judge of the High Court at Calcutta. Royal 8vo, cloth. Rs. 16. [1906.]

**TREVELYAN.—The Hindu Law of Inheritance, with a**

chapter on the Law of Wills. By Sir ERNEST JOHN TREVELYAN, D.C.L., Bar.-at-Law, late a Judge of the High Court at Calcutta. Royal 8vo, cloth. Rs. 8. [1913.]

**UPTON.—The Principles of the Law of Interest in**

British India. By EDMUND UPTON, Bar.-at-Law. Demy 8vo, cloth. Rs. 6. [1908.]

**WILSON.—Anglo-Muhammadian Law.** A Digest preceded

by a Historical and Descriptive Introduction of the Special Rules now applicable to Muhammadans as such by the Civil Courts of British India, with full references to ancient and modern authorities. By Sir ROWLAND KNYVET WILSON, Bart., M.A., LL.M., Bar.-at-Law. Fourth Edition. Royal 8vo, cloth. Nearly ready. [1912.]

**WOODROFFE AND AMEER ALI.—Civil Procedure in British**

India. A Commentary on Act V of 1908. By J. G. WOODROFFE, M.A., B.L., Bar.-at-Law, Judge of the High Court at Calcutta; and Right Honble. SYED AMEER ALI, M.A., C.I.E., late Judge of the High Court at Calcutta. Royal 8vo. Buff leather back. Rs. 16. [1908.]

**WOODROFFE.—The Law of Injunctions and Receivers :**

Being the Tagore Law Lectures, 1897. By J. G. WOODROFFE, M.A., B.C.L., Bar.-at-Law, Judge of the High Court at Calcutta.

Vol. I. **The Law of Injunctions.** Third Edition. Royal 8vo, cloth.

[In preparation.]

Vol. II. **The Law of Receivers.** Second Edition. Royal 8vo, cloth. Rs. 10.

[1910.]



